CONTEMPT PROCEEDINGS AGAINST SECRETARY OF COMMERCE, ROGERS C. B. MORTON

INCLUDING

HEARINGS AND RELATED DOCUMENTS

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

OF THE

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

INQUIRING INTO THE NATURE AND SCOPE OF THE ARAB BOYCOTT, ITS IMPACT ON DOMESTIC COMMERCE, AND THE AVAILABILITY OF INFORMATION TO CONGRESS

SEPTEMBER 22; OCTOBER 21 AND 22; AND NOVEMBER 11, 1975

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LETTER OF TRANSMITTAL

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., November 21, 1975.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, Washington, D.C.

DEAR MR. CHAIRMAN: I am transmitting herewith hearings and documents concerning the subcommittee's inquiry into the nature and scope of the Arab boycott, its impact on domestic commerce, and the availability of information to Congress. The intent of this document is to serve as necessary background for Members of the Interstate and Foreign Commerce Committee and the House of Representatives in their deliberations on the pending contempt proceedings against Secretary of Commerce, Rogers C. B. Morton.

On November 11, 1975, the Subcommittee found Secretary Morton in contempt of Congress by a vote of 10 to 5 and directed me to forward this information to you for appropriate action by the Committee on Interstate and Foreign Commerce. The subcommittee's action was taken because the Secretary repeatedly refused to comply with a duly authorized subpoena for Arab boycott reports which were compiled by the Department of Commerce pursuant to the Export Administration Act. (50 U.S.C. App. 2401–2413)

The Subcommittee needs the information withheld by Secretary Morton in order to evaluate the impact of the Arab boycott on American commerce, to find out whether Federal laws related to the boycott (such as the Federal Trade Commission Act and the Securities Exchange Act) are being enforced, and to determine whether new law is needed.

Secretary Morton has refused to comply with the subpoena on the grounds that to do so would violate 7(c), the confidentiality section of the Act. In so doing, he has relied on an opinion of the Attorney General.

The Export Administration Act requires that American firms must report to the Department of Commerce all requests to participate in the Arab trade boycott against Israel and firms doing business with Israel. Section 7(c) of the Act (50 U.S.C. App. 2406(c)) provides:

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with ref-

erence to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

Analysis of Secretary Morton's asserted defense by several leading constitutional law scholars, including Professor Raoul Berger of Harvard Law School, Professor Philip Kurland of the University of Chicago School of Law, and Professor Norman Dorsen of New York University School of Law, indicates that the Secretary's position is legally untenable. Accordingly, the Subcommittee repeatedly pointed out to Secretary Morton that Section 7(c) does not in any way refer to the Congress and no reasonable interpretation of that Section could support the position that Congress by implication had surrendered its legislative and oversight authority under Article I of the Constitution.

Legislative and oversight duties are in fact what is involved in this matter. The subcommittee, and indeed the Congress, needs the subpenaed documents in order to evaluate the impact of the Arab boycott on American commerce, to find out whether Federal laws related to the boycott (such as the FTC and Securities Exchange Acts) are being enforced, and to determine whether new law is needed. But the significance of Secretary Morton's construction of section 7(c) goes far beyond barring Congress from the Arab boycott information.

If Secretary Morton's argument for not complying with a valid Congressional subpena is allowed to remain unchallenged, it will establish a dangerous precedent which could be more pernicious than the doctrine of executive privilege. According to the Library of Congress report, it appears that Congress would be precluded from access to information compiled pursuant to nearly a hundred statutes similar to the statute cited by Secretary Morton.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

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CONTEMPT PROCEEDINGS AGAINST SECRETARY OF COMMERCE, ROGERS C. B. MORTON

MONDAY, SEPTEMBER 22, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2141, Rayburn House Office Building, Hon. John E. Moss, chairman, presiding.

Mr. Moss. The subcommittee will be in order.

At this time I have a statement I would like to make.

Free trade and freedom from religious discrimination are fundamental to the spirit of America. They are what this hearing is about. Today's hearing also deals with the right of Congress to obtain the truth from the executive branch. Without access to information, Congress cannot carry out its mandate under Article I of the U.S. Constitution to enact the laws of the land, and it most certainly cannot carry out its mandate of legislative oversight to determine whether existing law is being properly administered.

This hearing is part of the subcommittee's inquiry into the nature and scope of what is generally known as the Arab boycott. We seek to learn to what extent this boycott has impacted on domestic commerce.

By the terms of this boycott American companies and individuals have been asked to refrain from doing business with Israel, or with other American firms or individuals who do business with Israel, or with persons who have expressed support for Israel, or who are of the Jewish faith. The influence of this discriminatory boycott appears to be growing.

To find out what the effect of the boycott on our country has been, the subcommittee and ultimately the Congress needs answers to such questions as: How many companies have complied with boycott requests, and why? What kinds of products are covered? Have firms which have refused to comply lost business? Have they suffered a competitive disadvantage? In dollars and cents how much money is involved? Are the stocks of such companies traded on the U.S. stock exchanges? What steps should the Congress take?

We need answers to such questions in order to ascertain whether new laws are needed or whether the problem can be resolved by enforcing laws already enacted. As one of the first steps in this inquiry, we sought reports which are required by law to be filed with the Secretary of Commerce concerning attempts to cause an American firm to engage in a boycott. At least up to this morning, the Secretary has failed to furnish the reports in compliance with our subpena.

On February 26, 1975, President Ford in his ninth press conference set forth the administration's policy regarding such activities and I quote:

> There have been reports in recent weeks of attempts in the international banking community to discriminate against certain institutions or individuals on religious or ethnic grounds.
>
> There should be no doubt about the position of this Administration and the United States. Such discrimination is totally contrary to the American tradition and repugnant to American principles. It has no place in the free practice of commerce as it has flourished in this country.
>
> Foreign businessmen and investors are most welcome in the United States when they are willing to conform to the principles of our society. However, any allegations of discrimination will be fully investigated and appropriate action taken under the laws of the United States.

And those were the words of President Ford.

In addition, the Export Administration Act (50 U.S. App. 2402) sets forth U.S. policy as enacted by the Congress, and I quote again:

> (5) It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against any other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts, fostered or imposed by any foreign country against another country friendly to the United States.

This subcommittee's jurisdiction arises under the legislative powers of Congress specified in Article I of the Constitution and the Rules of the House of Representatives. Rule X establishes the Committee on Interstate and Foreign Commerce and gives it jurisdiction over the following:

> . . . Interstate and foreign commerce generally.
> . . . Consumer affairs and consumer protection.
> . . . Security and exchanges.

Included within the committee's jurisdiction are statutes administered by the Federal Trade Commission and the Securities and Exchange Commission. Section 5 of the Federal Trade Commission Act provides—

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

Section 10(b) of the Securities Exchange Act of 1934 provides that any "manipulative or deceptive device or contrivance" relating to the sale or purchase of securities is unlawful. In addition, under the regulations of the Securities and Exchange Commission (17 CFR 240.14a-1), public corporations are required to afford stockholders the opportunity to have proxy materials included in the proxy statement sent to stockholders apparently including such matter relating to the practices of a corporation regarding a proposed boycott request.

Furthermore, under the Securities Acts Amendments of 1975 (Public Law 94–29), the Commission has authority to apply to Federal courts to enjoin violation of the rules of any industry self-regulatory organization. The National Association of Securities Dealers' rules of fair practice require that its members observe just and equitable principles of trade in the conduct of the securities business.

This subcommittee is the oversight arm of the Committee on Interstate and Foreign Commerce with jurisdiction concurrent with that of the full committee. The subcommittee's oversight responsibilities are set forth in rule X of the Rules of the House of Representatives as follows:

Each standing committee (other than the Committee on Appropriations and the Committee on the Budget) shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated.

In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of that committee.

Over the past few months, the subcommittee has been requested by many persons, particularly our colleague and subcommittee member, the Honorable James H. Scheuer of New York, to commence an inquiry into the nature and scope of the Arab boycott of American firms doing business with Israel. During the course of our preliminary inquiry, the subcommittee has communicated with the Chairman of the Securities and Exchange Commission, with the Department of the Treasury, and with the Department of Justice. We have determined that the Department of Justice is currently investigating activities connected with the Arab boycott. We are advised that the Comptroller of the Currency felt the problem was significant enough to send a letter to all national banks stating that boycott provisions were not acceptable in bank transactions.

The Chairman of the Securities and Exchange Commission indicated that some firms had been excluded from securities transactions although not those registered with the Commission. The Commission advised the subcommittee that the National Association of Securities Dealers was concerned and was monitoring the situation.

At this point, I would like to include in the record copies of the correspondence between the subcommittee and the Securities and Exchange Commission, the Department of Justice, and the Department of the Treasury. They will be marked appendixes A through C respectively.

Is there any objection?

Hearing none, so ordered.

[See pages 139–144.]

Mr. Moss. In the course of our investigation, the subcommittee has come into possession of documents evidencing efforts by foreign firms and American firms to cause other American firms or individuals to agree to boycott provisions. Copies of these documents have been furnished to Secretary Morton and the Attorney General.

Without objection, those documents will be entered in the record and marked appendixes D through G respectively.

Hearing no objection, such will be the order.

[See pages 144–152.]

60-044—75——2

Mr. Moss. On July 10, 1975, the subcommittee wrote to the Director of the Office of Export Administration, Department of Commerce, requesting copies of reports of boycott requests which must be filed with the Department pursuant to the Export Administration Act. Under the Department's regulations these reports must indicate every instance in which a boycott request has been made to an American company, the number of transactions involved, and most importantly whether or not the company has agreed to comply with the boycott request. While there is currently no explicit legal prohibition on boycotts as such, the subcommittee will be looking into the question of whether the Federal Trade Commission Act or the Securities Exchange Act can be applied to such situations or whether new legislation is necessary.

Secretary Morton declined to produce these reports, citing section 7(c) of that act as a basis for his refusal. That section provides—

> No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

The Chair will note that section 7(c) does not in any way refer to the Congress nor does the Chair believe that any acceptable interpretation of that section could reach the result that Congress by implication had surrendered its legislative and oversight authority under article I and the Rules of the House of Representatives. The subcommittee wrote to Secretary Morton indicating the legislative purpose involved in this inquiry and its need for the reports in question. When they were not produced, the subcommittee issued a subpena at a regularly called meeting of the subcommittee on July 28, 1975. The return date of the subpena has been adjourned by the Chair until today. A copy of the correspondence between the subcommittee and the Secretary of Commerce and of the subcommittee's subpena will also be included in the record.

Is there objection?

Hearing none, they will be included as appendixes H and I.

[See pages 152–161.]

Mr. Moss. Finally, the chair will place in the record a copy of a memorandum dated September 5, 1975, prepared by the staff of the subcommittee and a memorandum dated September 19, 1975, prepared by the American Law Division of the Library of Congress, both concluding that section 7(c) of the Export Administration Act does not limit the Congress in obtaining the material which has been requested from the Department of Commerce.

Is there objection?

Hearing none, they will be included as appendixes J and K.

[See pages 161–172.]

Mr. Moss. Mr. Secretary, as a former Member of the House of Representatives, I am sure you are familiar with the seriousness of your position as thus far stated. I would now ask you whether you are prepared to comply with the subcommittee subpena. But before doing so I would ask that you be sworn and any member of your staff who will be joining you in supplying information to this subcommittee be sworn along with you.

Would you please stand.

[At this point the Honorable Rogers C. B. Morton, Karl Bakke and Richard Hull were sworn.]

Mr. Moss. Identify ourselves for the record.

TESTIMONY OF HON. ROGERS C. B. MORTON, SECRETARY, DEPARTMENT OF COMMERCE; ACCOMPANIED BY KARL BAKKE, GENERAL COUNSEL, AND RICHARD HULL, ASSISTANT GENERAL COUNSEL, DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION

Secretary MORTON. Secretary of Commerce, Rogers Morton. On my right is Mr. Karl Bakke, General Counsel for the Department. On my left is Mr. Dick Hull, who is General Counsel of the Domestic and International Business Administration of the Department of Commerce.

Mr. Moss. Thank you.

Secretary Morton, first, has the subcommittee supplied you with the pertinent rules of the House of Representatives and the rules of this subcommittee?

Secretary MORTON. Yes, sir, they have.

Mr. Moss. Secretary Morton, did you hear my opening statement in which I summarized our jurisdiction and legislative concerns in this matter?

Secretary MORTON. I heard it.

Mr. Moss. Did you receive a copy of the subcommittee's subpena dated July 28, 1975?

Secretary MORTON. Yes, sir.

Mr. Moss. Did you receive my letters of September 22, 1975, and of September 9, 1975, setting forth the subcommittee's legislative concerns regarding the reports in question and the necessity that the Department of Commerce comply with the subpena?

Secretary MORTON. I think you said—the one that I am not sure that we received, Mr. Chairman, is the one that was dated today. Did you say September 22?

Mr. Moss. You are correct. I was in error.

September 2, 1975, and September 9, 1975.

Secretary MORTON. Would you describe the document dated September 2, Mr. Chairman?

Mr. Moss. Yes. The document is addressed to the Honorable Rogers Morton, Secretary of Commerce, Washington, D.C.

"Dear Mr. Secretary. I have read with great care your letter of August 22, 1975——"

Secretary MORTON. Yes, sir, we have that.

Mr. Moss. You have received it.

Secretary MORTON. And we received the others.

Mr. Moss. And you are now familiar with the rules of the House, particularly rule X which authorizes and directs each committee to engage in legislative oversight activities?

Secretary MORTON. Yes; I am.

Mr. Moss. Have you carefully considered my opening statement, correspondence and the subcommittee documents?

Secretary MORTON. Very carefully I have considered the whole issue, Mr. Chairman.

Mr. Moss. Have you brought with you the reports called for by the subpena dated July 28, 1975?

Secretary MORTON. No; we have not.

Mr. Moss. Is there any physical or practical reason why these materials have not been provided?

Secretary MORTON. The materials have not been provided because we have been given an opinion by the Attorney General not to make them available.

Mr. Moss. Has that opinion been supplied to this subcommittee?

Secretary MORTON. It will be supplied in the course of my testimony, sir.

Mr. Moss. You are, of course—let me put it this way. Is your decision not to bring these materials with you made with the full knowledge of the possible action that may be taken by the committee for your refusal?

Secretary MORTON. Yes, sir.

Mr. Moss. Do you realize that as a result of the refusal to comply with the subpena you may be held in contempt of the House of Representatives with all the consequences that flow from such contempt?

Secretary MORTON. Yes, sir.

Mr. Moss. So that the record may be clear, as chairman of the subcommittee, I now hereby order and direct that you comply with the subcommittee subpena and that you provide forthwith the materials herein described.

Secretary MORTON. Mr. Chairman, going back to my previous answer, counsel advises me that the Attorney General's opinion was provided to you for the committee. I will also submit it for the record.

Mr. Moss. I thank you.

Secretary MORTON. And in connection with the last question, the Attorney General advises us that the committee cannot require us under the law to submit these documents.

Mr. Moss. Of course, we will hear from you, Mr. Secretary, but I want to make it very clear that the committee will not be frustrated in its efforts to obtain this material. I recognize that the Attorney General has drafted an opinion, and as the lawyer for the Executive Department his advice should be given great weight. But the actions and the determinations which are made on behalf of the Department are the sole responsibility of the Secretary of Commerce in whom the discretion to release 7(c) information publicly is vested, and is not vested in the Attorney General.

Secreary MORTON. Mr. Chairman, the statute, having read it, does not draw that distinction.

Mr. Moss. Well, we will hear you then, Mr. Secretary, and then we will engage in the discussion of the nature of the statute at that time.

Secretary MORTON. Thank you very much.

Mr. Moss. Notwithstanding the circumstances, it is pleasant to see you. I wish it were under more auspicious circumstances.

Secretary MORTON. Thank you very much, Mr. Chairman, and members of the committee.

It is always a pleasure and privilege regardless of circumstances for me to appear before any committee of Congress and particularly this very distinguished portion of the great Committee on Interstate and Foreign Commerce.

Mr. Chairman, as I said earlier, I have with me Mr. Karl Bakke, General Counsel of the Department, and also Mr. Dick Hull, General Counsel for DIBA which is the Domestic International Business Administration.

I am appearing today to explain the basis for declining the subcommittee's demand for copies of exporters' reports of so-called Arab boycott requests filed between December 31, 1969, and July 28, 1975, pursuant to section 369.2 of the Export Administration Regulations.

At the outset, I should explain that the term "boycott request" is somewhat misleading. In many instances, what is involved is a request for information concerning the extent of the firms' involvement in certain commercial relations with the State of Israel, rather than a request that the U.S. firm boycott Israel.

In virtually all transactions with most Arab countries, United States and other foreign firms are required to provide boycott-related information or certifications as a condition for completing the transaction. These requirements take various forms. Firms bidding on specific contracts—government or private—or those newly entering Arab markets, may be asked to answer questionnaires or to execute affidavits concerning the extent of their business relations with Israel.

In the case of straight export sales, which constitute the majority of transactions with Arab countries, the requirement usually arises at the time of shipment. The exporter, as a condition of receiving payment, typically is required to certify that the goods are not of Israeli origin or the products of firms boycotted by Arab nations, or that the shipping line and/or insurance company is not boycotted.

Failure on the part of the exporter to provide the requested information or certification will usually result in loss of the contract or sale. However, the fact that a U.S. exporter trades with Arab countries does not necessarily mean that it has boycotted Israel. There may be little or no market in Israel for the firm's goods or services. The firm may not be able to compete economically with other suppliers in that market, or any one of a variety of other business judgments may explain negative responses to the Arab questionnaires.

In fact, a U.S. firm trading with Arab countries may very well be trading with Israel as well, since the Arab boycott list does not extend to U.S. firms engaging in routine trade with Israel.

The Export Administration Act and implementing regulations require U.S. exporters to report to the Department of Commerce the receipt of boycott-related requests, even though the firm does not intend to comply with those requests. The reports describe the type of request received, the country from which it originated, the name and address of the party making such request, the details of the transactions or trade opportunity in connection with which the request was made—including a description of the commodities or services involved and other specific commercial data such as quantities and prices, when available.

As you know, Mr. Chairman, I have explained why I believe that it would be contrary to the national interest for me to disclose copies of these individual reports, both in a letter to you dated July 24, 1975, and in a letter to Chairman Staggers dated August 22, 1975.

I shall not burden the subcommittee by reiterating these reasons, but copies of these letters are attached to my statement and I request that they be made a part of the record of this hearing.

Mr. Moss. Without objection, and the Chair notes that both letters are printed in exhibit H previously placed in the record.[1]

Secretary MORTON. I am aware that the second of these letters received some attention in the press, and that my declining to provide the requested documents to the subcommittee has been construed by some as indicating tacit support within the administration for the League of Arab Nations' economic boycott against the State of Israel. However, I want to stress that such is not the case.

We are clearly on record in fully supporting the 1965 declaration of policy by the Congress, opposing boycotts by any nation against another country friendly to the United States and requesting U.S. domestic concerns not to take any actions that would lend them support. However, the particular issues involved in efforts of the League of Arab Nations to encourage a secondary boycott of Israel are not the reasons for my declining to produce the documents.

To explain my position fully, it is necessary to provide some background on the Export Administration Act and the confidentiality safeguards enacted by Congress.

The Export Administration Act of 1969 and its predecessor, the Export Control Act of 1949, grant the President authority to restrict exports to the extent necessary to carry out three stated policy purposes. These are: First, to protect our national security; second, to further our foreign policy; and third, to preserve adequate supplies of scarce commodities to meet the needs of domestic consumers. The President has delegated this authority to the Secretary of Commerce.

In carrying out its responsibilities, the Department administers a program involving licensing of exports and investigation of violations of statutory or regulatory requirements. Accordingly, the Department must, of necessity, obtain from individual exporters a considerable amount of commercial information on particular export transactions that is obviously of a very sensitive nature. Indeed, there are occasions when even the fact that a particular company is involved in an export transaction could, if available to the applicant's competitors, cause that company serious economic harm.

Moreover, the mere fact that a U.S. company is identified as trading with a particular country could subject that company to domestic pressures and economic reprisals. This may occur, even though such trade may be perfectly legal.

Mr. SCHEUER. Mr. Chairman, would the witness yield at that point for a brief question?

Mr. Moss. The Chair will recognize the gentleman for one question and then he would hope that we will be able to continue with the witness until his statement is concluded.

Mr. SCHEUER. Mr. Secretary, you say that trading with the Arab countries and conforming to their requirements of providing information and perhaps refusing to deal with another American company doing business with Israel is legal. It may or may not be legal under our antitrust laws, but assuming it is legal, isn't it contrary to the clear

[1] See p. 152 for letter dated July 24, 1975, and p. 157 for letter dated Aug. 22, 1975.

public policy of the United States? Isn't it contrary to the urgings of our State Department and the Commerce Department that American companies not acquiesce to the Arab boycott? If it is clearly contrary to your instructions to them and to Presidential policy, State Department policy, and the policy of the Congress, then if they insist on flagrantly violating the declared public policy of this country even though it may be legal to do so why are they entitled to a cloak of secrecy in making the choice to cave into the boycott threats and flout our national policy? Under present law they have the right to make that choice, perhaps, but why don't their stockholders have a right to know of their choice? Why don't their customers have the right to know that? Why don't the consumers of America have the right to know of that choice and why doesn't the Congress of the United States have a right to know of that choice?

Mr. DEVINE. Parliamentary inquiry, Mr. Chairman.

Mr. MOSS. Mr. Devine.

Mr. DEVINE. Mr. Chairman, would it not be a more orderly procedure to permit the Secretary to conclude his statement?

Mr. MOSS. The Chair just stated that he would briefly recognize the gentleman from New York, and than he would hope that the members would permit the Secretary to conclude his statement before any further questions would be addressed to him. The Chair has the responsibility of attempting to protect the rights of members, and if the requests of members are reasonable, to grant those requests, but he would hope that we would be able to continue on with the statement after Mr. Scheuer has completed his question.

Secretary MORTON. In answer to the Congressman's question, I think there is a lot of confusion about the extent to which these reports reflect cooperation with and participation in a boycott. Various sources have labeled these reports as a list of firms boycotting Israel, firms capitulating or surrendering to commercial blackmail, and I think these labels are for the most part inaccurate, as I note in my statement.

The fact that a firm reports the receipt of a boycott request or even responds to it does not necessarily indicate cooperation with or the actual boycott. The factors such as market condition is Israel, foreign competition, and other things may dictate that the firm's market is in the Arab countries and not in Israel, or firms may be trading with both Israel and Arab countries since the boycott does not preclude routine civilian trade with Israel. I do not believe that such a U.S. firm should be subjected to the risk of domestic sanctions for obeying the law and reporting boycott requests, particularly since it is lawful to trade with the Arab countries even where boycott requests are involved.

So, I think we get down to where you have to look at the law.

I will continue my statement, Mr. Chairman.

I think I stopped at the end of the paragraph that begins with the sentence: "This may occur, even though such trade may be perfectly legal."

Mr. MOSS. That is correct.

Secretary MORTON. This is why, in enacting the Export Control Act of 1949, Congress wisely sought to protect exporters from disclosure of such confidential information. At the same time, by providing such protection, Congress sought to insure that individual companies would fully cooperate with the agency responsible for administering the act

in providing all of the information which such agency needed to administer the act effectively.

Thus, the confidentiality provision enacted as section 6(c) of the Export Control Act of 1949 (reenacted without any change in 1969 as sec. 7(c) of the Export Administration Act) is not only designed to safeguard proprietary commercial information of U.S. companies but also to assure the effective administration of export control programs. Section 7(c) provides:

> No department, agency, or official exercising any functions under this act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

In effect, this provision pledges to the business community that information required by the act to be reported to the Department will, when submitted in confidence or deemed by the Department to be confidential, not be disclosed to any third party unless the Secretary of Commerce personally determines in a particular instance that continued confidentiality would be contrary to the national interest.

That pledge has been adhered to by every Secretary of Commerce since it was first enacted in 1949, even as to the identity of a particular U.S. exporter and/or the details of a particular transaction. Thus, compliance with a request such as the subcommittee has made, which would require disclosure of literally thousands of exporters and transactions, must be viewed with particular concern and caution.

As a matter of fact, this is by no means a new issue. You may recall, Mr. Chairman, that in 1961, when you were chairman of a special subcommittee on Government information, you had a lengthy exchange of letters with then Secretary of Commerce Luther H. Hodges concerning your desired for disclosure of the identity of firms that had been granted licenses to export machinery to the Soviet Union. This exchange of letters was published in the 56th Quarterly Report to the Congress, and copies of this report were distributed to every Member of the 87th Congress. I would also like to submit copies of that correspondence for the record today.

Mr. Moss. Without objection, the material referred to will be included in the record immediately following the statement of the Secretary. [See p. 12.]

Secretary MORTON. Thank you, Mr. Chairman.

The outcome of the dialogue was a determination by Secretary Hodges that, while it would be appropriate to publish aggregated statistical data concerning the volume and dollar value of licensed exports, the commodities involved and the country of destination, to maintain confidentiality of the names of exporters and the details of individual transactions, would not be contrary to the national interest. In his letter to you of June 27, 1961, Secretary Hodges summarized his statutory responsibilities as follows:

> In other words, the statute which I am obligated to follow does not merely authorize me to maintain the confidentiality of export license information, if I find that would be desirable, but I am required to do so unless I find affirmatively that maintaining the confidentality of such information would be "contrary to the national interest."

I concur fully with that interpretation of the statutory mandate which I must observe in the present case.

In 1961, Secretary Hodges was concerned that disclosing the identity of firms exporting to the Soviet Union and the details of their individual transactions could subject these firms to domestic pressures and economic reprisals, even though such trade were perfectly legal, and might give their competitors an unfair adavntage.

This concern is equally applicable to the disclosure of the reports which you have requested, and demonstrates that the underlying issue is not new and is separate from the Arab boycott per se. In other words, the fundamental question is whether the subcommittee's request, whether concerning the Arab boycott or some other matter, meets the statutory standard for waiver of the confidentiality provision contained in section 7(c) of the Export Administration Act. It is my firm belief that this standard has not been met in this particular instance.

I understand, Mr. Chairman, that you believe the confidentiality safeguards of section 7(c) do not apply to disclosures to a committee or subcommittee of Congress having jurisdiction over the subject matter. However, I have sought and obtained an opinion from the Attorney General, which concludes, after full discussion of the legal issues and the legislative history of the statutory provision involved, that the reports subpenaed by the subcommittee need not be disclosed unless I determine, in the exercise of the discretion conferred upon me by section 7(c), that withholding them from the subcommittee would be contrary to the national interest. I would like to submit for the record a copy of the Attorney General's opinion, dated September 4, 1975, for the record.

Mr. Moss. Without objection, the Attorney General's opinion will be included as appendix L [see pages 172–175].

Secretary MORTON. Thank you, sir.

To determine that withholding the reports would not be contrary to the national interest, Congress has placed responsibility not with its committees but with the Secretary. Unless such a determination is warranted, the confidentiality provision of section 7(c) controls.

While I am unable to make the statutory determination required to permit disclosure to the subcommittee of the documents in question, I am sympathetic to the subcommittee's need for information in discharge of its oversight responsibilities. Accordingly, in addition to the summary of exporter reports through June 30, 1975—that was submitted to the subcommittee earlier this month—I now reiterate the offer in my August 22 letter to Chairman Staggers to make available to the subcommittee copies of the requested reports from which are deleted the identity of the firms and the details of the commercial transactions involved.

Mr. Chairman, on September 12, you also requested that I provide the subcommittee with copies of all trade opportunities circulated by the Department of Commerce which contained a boycott-related provision, along with copies of any transmittal letters from the Department pertaining to these trade opportunities. These documents are not subject to the confidentiality provisions of section 7(c) and will be delivered to the subcommittee as soon as we have completed the search of our files.

Likewise, on September 17, you requested that I provide the subcommittee with documents originated by an officer of the Department

of State which contain extremely sensitive company information, but which are not subject to the confidentiality provisions of section 7(c). With the concurrence of the Department of State, these documents were delivered to you on September 19.

Finally, I am aware that on September 19, you requested me to provide the subcommittee with all the exporters' reports since 1970 pertaining to transactions involving seven U.S. firms. These reports are subject to the confidentiality requirements of section 7(c). For this reason, I must decline your request. However, with respect to your question whether any of these firms failed to report to the Department the boycott-related requests encountered in those transactions, we are searching our files and will advise you as soon as this search is completed.

In summary I want to stress that I have the utmost respect for the Congress and for this House, of which I was a Member for many years. However, as the executive charged with administering the statutory provision in question, I would be failing to discharge the responsibilities required of me by law were I to disclose, without any deletions, the exporters' reports which you have requested, in view of my inability to find that the national interest would be adversely affected by failure to make such disclosure.

This concludes my presentation, Mr. Chairman, and I will be pleased to answer any questions.

[The documents referred to follow:]

[From the Quarterly Report Under Export Control Act, pp. 22-29]

PUBLICATION OF EXPORT LICENSE INFORMATION

Following a careful study within the Department and consultation with other agencies and departments of the Government (including Members of Congress) and private industry, the Secretary announced on June 28, 1961, a change in the Department's longstanding policy relative to the disclosure of information with respect to the issuances of export licenses.

[Following is the exchange of correspondence between Secretary Hodges and Congressman John E. Moss, chairman of the Special Government Information Subcommittee of the Committee on Government Operations of the House of Representatives:]

MARCH 10, 1961.

DEAR MR. SECRETARY: In recent weeks the Special Subcommittee on Government Information has received a number of complaints from publications interested in the availability of export license information. Following its established procedures, the subcommittee has reopened discussions with Department of Commerce officials about existing restrictions on such information. The subcommittee first investigated this problem in 1956, at which time extensive hearings were conducted on certain applications of the Export Control Act. The matter also was the subject of correspondence between the Secretary of Commerce and the subcommittee during May–July 1956.

The current point at issue is the identification of firms granted licenses under the Export Control Act. At present the Department still follows the policy of the previous administration in refusing to confirm the names, freely available in the trade press, of firms which have been granted licenses to ship machinery to the Soviet Union.

In substance, Department officials have claimed that identifying the company granted an export license, naming the product to be exported, and listing the amount of the transaction would give an unfair advantage to the licensed exporter's competitors. In addition, Department officials say complete secrecy has been promised to all business firms so that they will cooperate in furnishing the information necessary for the control of exports. And finally, a Department spokesman has claimed that the controversial nature of exports to the Soviet

Union dictates that business firms should be protected by Government-imposed secrecy from any unwarranted criticism or unfavorable publicity.

Subcommittee invesigation has disclosed that Department officials are claiming authority for such secrecy in title 50 (appendix), section 2026, especially paragraph (c):

"No department, agency, or official exercising any functions under this act (secs. 2021–2032 of this appendix) shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the persons furnishings such information unless the head of such department or agency determines that the withholding thereof is contrary to the national interest."

There can be no quarrel with laws protecting legitimate trade secrets, manufacturing processes, and other business information which firms are required to provide the Government for statistical and other purposes. A serious question is raised, however, when the interpretation of law permits restrictions on even the name of a firm granted a license to make shipments behind the Iron Curtain.

Apparently, Mr. Secretary, the new administration has not had an opportunity to review the restrictive information policies of the previous administration and, in the absence of such a review, the former policies continue to be enforced. The subcommittee would appreciate a full explanation of the information problems involved in the administration of the Export Control Act and report on the steps you plan to take to remove unnecessary information restrictions.

Sincerely,

JOHN E. MOSS.

* * *

MARCH 17, 1961.

DEAR MR. CHAIRMAN: This will acknowledge and thank you for your recent letter concerning availability of export license information from the Department of Commerce.

You are correct that I have not had the opportunity to review all the information procedures followed by the previous administration, and I am sure you can understand that in the absence of a review and decision for change, procedures previously established continue to be followed.

I would like to emphasize that it will be my purpose to make fully available all information concerning the operation of the Department of Commerce, subject only to the limitation that full disclosure would not be made where such would be contrary to the public interest. This is the basic principle I want to follow, and while there may be some difference of opinion in given cases concerning the application of this principle, I am sure I shall have no difference of opinion with your subcommitte as to the desirability of informing the public on the activities of this Department.

As to the specific question you have raised concerning availability of export license information, my quick reaction is that there could be little justification for the Department to maintain a secrecy stamp on something that is freely circulated in trade publications. However, before coming to any final conclusions on this or any other specific question, I do want to have our recently appointed Director of Information, Mr. William Ruder, carefully review this matter and others and advise me as to his findings. In the meantime, I hope that you will authorize staff members of your committee to consult with Mr. Ruder and inform him on any other specific situations within this Department which have been brought to your attention and on which you have a question as to the procedure followed by the previous administration. In addition, I am asking our General Counsel, Mr. Robert E. Giles, to assist in this review of Departmental procedures.

I believe that within 2 to 3 weeks or less, we will have completed our review and reached some tentative conclusions. If there then seem to be any points at issue, I would like to have the privilege of discussing them in person with you.

Again, may I express appreciation for your recent letter and assure you of my desire to cooperate fully with your subcommittee.

Sincerely,

LUTHER H. HODGES.

* * *

APRIL 5, 1961.

DEAR MR. CHAIRMAN: This is in further response to your letter of March 10 concerning the availability of export license information for general publication.

As indicated to you in my letter of March 17, we wanted to review carefully the particular question you raised and its implications generally in the administration of the Export Control Act. We have now reached some tentative conclusions, as outlined in this letter. I would like to emphasize that these are *tentative* inasmuch as I would like to have the benefit of your views and also those of the chairmen of the Senate and House Banking and Currency Committees. These committees are, as you know, regularly concerned with the administration of the Export Control Act and are familiar with the policy which has been followed in the past on maintaining in confidence the details of individual export licenses.

You are of course aware that under the presently followed policy—and which has been the practice for some years—summary and statistical information is regularly published and made generally available as to the commodities involved, quantity, and value, as well as the countries of destination of all exports. For your convenient reference, sample copies of these publications are enclosed.

At the present time from 10,000 to 12,000 export licenses are issued each month. This means that final approval is given to about 500 applications daily. Of course the vast majority of these applications present no particularly troublesome question and the overwhelming majority cover shipment of goods to other than Soviet-bloc countries.

You are of course familiar with section 6(c) of the Export Control Act which provides in substance that information obtained under the act shall be deemed confidential unless the head of the agency (in this case the Secretary of Commerce) determines that maintaining the information in confidence would be contrary to the national interest. It seems to be very clear that the present law requires the administrator of the Export Control Act to start out with the *presumption* that information obtained under the act shall be kept in confidence—and that in a sense the burden of proof must be met in order to do otherwise. In other words, the statute which was enacted by Congress and which I am obligated to follow does not merely authorize me to maintain the confidentiality of export license information, if in certain exceptional cases I find that to be desirable, but rather I am *required* to maintain such confidence unless I determine that doing so is "contrary to the national interest." For your convenience I quote section 6(c) which reads as follows:

"No department, agency, or official exercising any functions under this act (secs. 2021, 2032 of this appendix), shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information unless the head of such department or agency determines that the withholding thereof is contrary to the national interest"

It has been brought to my attention that on a few occasions in the past the fact an export license has been granted to a particular company to ship a commodity to a specific country has been published in a trade magazine or newspaper, and the Department of Commerce has been asked to verify such information. In accordance with the established policy, staff personnel have declined to confirm or deny such reports. I am told that the actual number of instances on which such publication has been made and verification requested of the Department are very, very few, but these instances are cited as demonstrating the "untenableness" of the Department's policy on maintaining export license information in confidence.

I can of course understand this sort of reaction, but I do not agree that because these few instances have occurred, the conclusion necessarily follows that the Department should routinely make available a complete list of all export licenses issued including details of the export in question. At the most, the few instances of publication of export license information by sources other than the Department of Commerce might logically lead to the conclusion that the Department would be justified in either confirming or denying the accuracy of the published information—as to these specific cases only.

The point that I am making is that even though an individual firm freely gave out information as to an export license it had obtained, it does not follow that release of detailed information on *all* export licenses granted would be in the national interest. Obviously, exactly the opposite could very well be the case.

I certainly recognize that availability of information as to the Government's regulatory activities can also serve the national interest; and you will recall that I stated in my recent letter to you that, "I would like to emphasize that it will

be my purpose to make fully available all information concerning the Department of Commerce, subject only to the limitation that full disclosure would not be made where such would be contrary to the public interest." I would also add that it is my purpose to maintain information in confidence only where such decision on my part is clearly authorized by law.

It is quite obvious that the matter of export license information presents an issue of competing interests. On the one hand, there is the very basic and fundamental interest of *availability* to the general public of information on the activities of our Government. On the other hand, there are legitimate interests respecting the trade and commercial position of each applicant granted an export license. There are some things that the Government requires of its citizens as to which the details, in good reason and commonsense, simply should not be bandied about to satisfy the idle curiosity of anyone. A good and apparently noncontroversial example of this is the personal income tax return of the individual citizen. Nobody suggests that the Federal Government should routinely publish a list of income-tax payers, with amount of income and amount of tax paid. It may be that because practically every citizen is subject to income taxes, we don't hear any serious suggestion that information on income tax returns be made public. I think it is quite conceivable that if the average citizen in this country were in the export business and had to apply for an export license—to something like the extent that we have to file income tax returns—we might not have any question about maintaining the confidentiality of export license information.

I am not implying that an export license is in precisely the same category as an income tax return. I do ask myself the question, however, who wants to know the business details on the export licenses which are issued? And what good and valid public purpose is to be served by publicizing such information? It is not enough simply to say that all information about Government activity should be available and this is sufficient reason of itself—because that argument would apply equally to full disclosure about everyone's income tax return.

I have made the above comments for the purpose of explaining to you my feeling that this is not a one-sided issue.

At this point a clear distinction should be made between the position which I understand the Department has taken in the past in making available to congressional committees, on a confidential basis, full information about any export license which has been granted or denied. I would certainly continue this policy and would make available to a committee of Congress *full and complete details* on any export license, and I feel this should be done on the basis of confidentiality which is contemplated by the express provisions of the Export Control Act itself. All of my previous comments relate to the availability of this information for *general publication*, not for the official use of a congressional committee.

As I have previously stated, I believe there is a definite national interest in maintaining maximum availability of information to the public at large concerning the activities of our Government. Therefore, I have reached the *tentative* conclusion that it would be consistent with the total national interest, as provided in section 6(c) of the Export Control Act, to make available on a routine and periodic basis the following information about each export license granted by the Department: (1) identity of licensee, (2) article or commodity approved for export, and (3) authorized country of destination. I do not feel that other details, such as the exact quantity and value of the shipment, should be publicized because this information is certainly more in the category of private business and trade data the publication of which would serve no public purpose and could very well contribute to a licensee's private business disadvantage.

In your letter of March 10 you stated, "There can be no quarrel with laws protecting legitimate trade secrets, manufacturing processes, and other business information which firms are required to provide the Government for statistical and other purposes." The Department of course concurs in this statement. You also said in your letter of March 10 that, "A serious question is raised, however, when the interpretation of law permits restrictions on even the name of a firm granted a license to make shipments behind the Iron Curtain." On this point I should like to be very emphatic and say that in my opinion there is no valid justification for distinguishing between licensees authorized to ship "behind the Iron Curtain" and those who may be authorized to ship "in front of the Iron Curtain." Any licenses granted to ship products to the Soviet Union will be in

accordance with laws enacted by Congress. The licensees in such cases should not be subject to censure or specially critical attention for carrying on a legitimate business activity authorized by Federal law. Therefore, any release of information which I would propose to make would apply across the board to all licensees, for all countries, and I would not be limited to the Soviet Union or its satellites.

I shall appreciate very much having your specific comments on the tentative proposal I have presented. Since both House and Senate Banking and Currency Committees are regularly concerned with the administration of the Export Control Act. I am advising the chairman of these committees of this proposal and making a similar request for their comments.

Sincerely yours,

LUTHER H. HODGES.

* * *

APRIL 11, 1961.

DEAR MR. SECRETARY: Your letter to me of April 5, 1961, spells out a highly commendable proposal to reverse 20 years of secrecy surrounding the names of business firms granted the privilege of exporting certain critical materials. Your proposal is clearly in line with President Kennedy's firm views on the need to inform the people on the facts of government.

When licensing of private companies to export critical materials was undertaken on the eve of U.S. entry into World War II, Government officials believed it was necessary to conceal in secrecy every detail of individual transactions. This policy continued after World War II and was even stretched into recent years in spite of repeated complaints filed with the previous administration. During this period, the Department of Commerce interpreted its authority so broadly that even the names of firms granted export privileges have been ordered withheld.

It appears that your review of this problem has resulted in a fresh approach which takes into acount the fact that the people must be informed if they are to be effective citizens in a democracy. Your letter of April 5, 1961, states it is your tentative decision that the Department will make available lists of export licenses granted, including the name of each firm receiving a license, the article or commodity approved for export, and the country of destination.

This action would be a major step toward recognition of the fact that special privileges—whether in the form of licenses, tax relief, or other benefits—can be conferred by a democratic government only when the people are privy to all details of the grant of privilege.

It is my understanding that, because of the fact that the export license form presently used reflects the policy of the previous administration and contains the statement that information "is deemed confidential and will not be published or disclosed," your legal staff questions the propriety and legality of releasing information about present license holders.

I hope that the new policy permitting public access to information about persons granted the privilege of export licenses in the future will be put into effect as soon as possible.

Sincerely,

JOHN E. MOSS.

* * *

JUNE 27, 1961.

DEAR MR. CHAIRMAN: After careful consideration of all aspects of your inquiry concerning availability of export license information, I have come to the following conclusion:

The Department of Commerce will make available—on a routine basis—the following information on export licenses approved by the Department: (1) general description of article or commodity approved for export; (2) the amount of commodity or item approved for export; and (3) the country of destination. This information will be in the form of a list of licenses approved by the Department and we expect the list will be issued either daily or every other day. We ment and we expect the list will be issued either daily or every other day. As you know, 10,000 to 12,000 individual export licenses are processed and approved by the Department of Commerce monthly, and a daily list would include 500 or more individual export licenses.

I gave very careful consideration to the possibility of also making public—on a similar routine basis—the name of each business firm for which an export license is approved. I reached the conclusion that identification of individual business firms would not be in the total public interest.

The Congress itself has clearly stated in the Export Control Act the basic policy which I am required to follow in making public export license information. That act provides in substance that information obtained for export license purposes shall be deemed confidential unless the head of the agency (in this case the Secretary of Commerce) determines that maintaining the information in confidence would be contrary to the national interest. In other words, the statute which I am obligated to follow does not merely authorize me to maintain the confidentiality of export license information, if I find that would be desirable, but I am required to do so unless I find affirmatively that maintaining the confidentiality of such information would be "contrary to the national interest." I do not think that giving publicity to the names of individual exporting firms will contribute to the national welfare, and in fact, I am convinced that such publication might very well have the opposite result. By identifying individual business firms, along with other pertinent data, vital information reflecting the trade and commercial position of each company would be revealed. This in turn could and likely would in many instances lead to disruptions of the normal competitive relationships between the many business firms in the export business, and could very well result in reducing the Nation's export business at a time when it should be expanded. In addition, I feel that publication of trade information as to individual firms would particularly be of potential damage to the smaller companies in the export business which are in the process of developing their oversea markets and gaining a toehold in a highly competitive business activity.

A point of more substance and I think of greater significance is that—from the national interest—the vital information is not what *particular company* has been licensed to export, but *what decision* has been made by the Government to authorize *what commodity* to be exported to *what country*. In terms of the public interest and what should be of public concern, it is far more important to know what commodity or item the Government has approved for export to what particular country than it is to know the name of the individual business firm that has applied for and received an export license.

Keeping in mind that the Export Control Act itself contemplates that a very large measure of confidentiality shall attach to export license information, I believe that the data which I have indicated will be made publicly available is completely adequate for an informed evaluation on the part of the general public as to what the Government is doing in the field of export licensing. At the same time, I believe this decision gives proper and reasonable recognition to the private trade and commercial interests of the individual firms which must be taken into account if we are to encourage and maintain a strong and competitive free enterprise export business activity.

I understand that much the same basic question on availability of information, with respect to both exports and imports was raised by your committee a few years ago. The results of your inquiry are described in the comprehensive report issued by your committee, entitled "Availability of Information From Federal Departments and Agencies," and further identified as House Report 2578, dated August 13, 1958. I particularly noted with interest your letter of March 6, 1957, referred to on page 135 of House Report 2578, in which you wrote in part: "I am not aware that anyone is demanding that importers of material be identified by name, but I do know that all segments of the industry want daily information and statistics as to what, when, and where imports are being received." It also appears that much the same issue with respect to *export* information was dealt with in 1957 as related in House Report 2578.

I think it is important to emphasize that the release of export license information which I propose to make applies across the board to all exports, to all countries—whether these exports go behind or in front of the Iron Curtain. I emphatically do not agree with certain comments I have seen published in recent weeks as to how important it is to know just "what company" would dare ship goods to such and such a country. Any export license granted by the Department of Commerce will be pursuant to the laws enacted by Congress, and in recognition of the total national interest, including of course the national security. As you know, by Executive order the Secretary of Commerce, the Secretary of State, and the Secretary of Defense constitute a Board of Export Review to which will be referred specific export license applications involving questions of national security on which agreement between these three Departments has not been reached at lower staff level. The President recently took this action to bring about better coordination between the interested departments in the executive branch.

We are confident that proper and adequate consideration will be given to all questions involved in the issuance of export licenses. Individual business firms should not, therefore, be subjected to censure for carrying on a legitimate business activity authorized by Federal law and specifically approved in individual export license cases by Federal officials. Any question or criticism with respect to a given decision should be directed to the responsible Federal officials who granted the export license—and of course the persons ultimately responsible on export licensing will be in the Department of Commerce and the official with ultimate responsibility is the Secretary of Commerce. I shall do my best to carry out this responsibility so as to protect and advance the total interest of our Nation.

May I express my personal appreciation to you and the members of your committee for raising the question with us as to availability of public information about export licensing. By so doing, you have prompted us to make a thorough review of past practices and I believe that the new procedure I have outlined above is constructive and in the public interest and will afford an opportunity for the public to be better and more promptly informed on the export licensing activity of the Government.

Sincerely yours,

LUTHER H. HODGES.

Mr. Moss. Mr. Secretary, I find your presentation very interesting, including the citation of the letter from Secretary Hodges. I have to fall back on my memory, and very quickly look at the enclosure which was just handed me. At that time Secretary Hodges made substantial concessions to the committee, and that was the Committee on Government Operations having a charter charging it with examining the operations of the Government at all levels to determine the efficiency and economy of operations. That was not a committee with the same needs, the same requirements, or the same jurisdiction as the Committee on Interstate and Foreign Commerce. I think that you are aware of the differences in the basic rule delegating authority to the two committees, are you not?

Secretary MORTON. Yes, but the same law applies in both cases.

Mr. Moss. That is a matter for further examination because the determination here again, in the Chair's judgment goes to the statute which is similar to over a hundred statutes dealing with information, such as tobacco statistics, data on the production of potatoes, the immigration registration data, certain SEC filings, and statisical data filed with the Bureau of Foreign and Domestic Commerce. In all these instances the Congress has used virtually the typical boilerplate that is included here. The Congress is not foreclosed from inquiring into those areas and the use of the information for legislative purposes.

I think of greater significance to this inquiry is the fact that the Congress has traditionally, whenever it wanted to bar availability to the Congress, been able to address that question with great precision. It has made, in the instance of the Internal Revenue Code, very clear that a committee—excepting one committee of this House and unless an action is taken by the full committee and addressed to the President—may not see income tax returns. It has taken in the case of the National Aeronautics and Space Administration similar action to clearly limit access to information, that instance it gave NASA officials discretion regarding public disclosure, not upon any access sought by the Congress.

Now, intervening between the time of the hearings with Secretary Hodges, and in a small measure because of the problems with Secretary Hodges and Secretary McNamara and others, we enacted, 5 U.S.C. 552 (c) of the Freedom of Information Act.

Now, it is very specifically not applicable to the Congress because it goes to questions of secrecy, questions of access to information. The Congress has the only constitutional right to secrecy. You can search the Constitution and read every word and only in one instance is the word "secret" used and that is article I in connection with the right of Congress to keep its Journal secret, it is not given to anyone else.

This delegation of authority, in the matter of section 7(c) of the Export Control Act deals with a public right or a public availability. Surely you do not equate the congressional need to legislate with the public interest in a matter or the public requirements for information, do you, Mr. Secretary?

Secretary MORTON. Let me quote again from the Attorney General's opinion. I am not a lawyer and perhaps more than some other Secretaries of Commerce in a legal matter similar to this lean heavily on advice of counsel and on the opinions of the counsel who are charged with the responsibility of advising us.

In the opinion he says:

> The foregoing opinions have preceded under the general assumption—

which I share—

> that statutory restrictions within Executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees. That this assumption accords with general legislative intent as demonstrated by the inclusion in a number of statutes concerning confidentiality of information of explicit exceptions for congressional requests. When as in Section 7(c) such an exemption is not provided, it is presumably not intended. In the present case this standard interpretation finds additional support in the legislative history of the statute in an apparently consistent administrative construction and in the Congress' reenactment of the provision with the knowledge of that construction.

It was reenacted a second time and, therefore, from the point of view of trying to do my job and trying to obtain all of the intelligence that we can about our commercial operations, I am put in a terrible spot if I change the rules of the game in the middle of it.

Now, all of these reports, plus literally hundreds of other very sensitive types of information are reported to the Department of Commerce, very frequently to the Secretary and they are reported to us with the understanding that they are going to be maintained in confidence.

Now, if suddenly we break faith with that great number of people, it is going to be very, very difficult for the Department of Commerce to expect a high level of cooperation from the business world. It seems to me that the way to get at that is to change the law and I certainly would bow to your wisdom on what it would say. If we are going to change the rules of the game in this instance, let's do it aboveboard and I think that is the approach. I think for you to ask me to break faith with the business community when the Government depends so heavily on this information which would dry up immediately if we broke faith with them and disclosed it, you know perfectly well—and I was there, we were all there.

Mr. MOSS. Mr. Secretary, some of the information we are requesting deals with filings required to be made by law.

Secretary MORTON. Right.

Mr. MOSS. The other information is information where you are vested with the discretion, you are not given an absolute instruction.

You are vested with discretion relative to the publication and public disclosure.

Now, there is a standard for you to follow in the exercise of judgment relative to that. I think that two things are relevant here. The statutes you have cited regarding the affirmative language stating that "none of the information contained in here or referred to bearing upon the statute shall be denied to the Congress or any committee thereof" is language which we have carefully drafted into the legislation coming out of committees upon which I have served following the adoption of 5 U.S.C. 552 in order to make very clear again the fact that the Congress was not intending itself to be foreclosed.

We thought it was clear that Congress was not limiting itself because when they did want to be foreclosed, as I pointed out, they have done so with great precision and made that point quite clear.

Now, additionally, the Library of Congress' memorandum states:

> It would seem doubtful that a valid presumption exists that Congress, would by implication, divest itself of its ability to obtain information in pursuance of its oversight function. In any event, contrary to the Attorney General's opinion, we conclude that Section 7(c) of the Export Administration Act of 1969 does not prohibit either by express language or necessary implication, disclosure of matters covered to an appropriate committee of the Congress; that the express applicability of the Freedom of Information Act to the functions under this Act is in fact persuasive indication that the prohibition was not meant to be applicable to Congress but only to the general public so as to avoid administrative misuse of confidenetial information; That Congress would divest itself of its ability to obtain information from relevant Executive agencies by implications contrary to the pervasive scheme of the subject legislation and determination of the statutorily imposed duty of oversight of standing committees of the Congress; and that the prohibition against disclosure of confidential information in 18 U.S.C. 1905 cannot be raised as an objection to disclosure by Executive officials since such disclosure is authorized by law.

That opinion has been placed in the record. The Chair at this time will recognize, for 5 minutes each, each Member in the order of their appearance at the committee hearing this morning. That is the Chair's reward for early attendance.

Mr. Scheuer.

Mr. SCHEUER. Mr. Secretary, as a very well-liked and respected former Member, you are more than welcome here today and we always enjoy the opportunity of chatting with you.

When you get these many hundreds of notices from each of the companies that have field notice with you that they have been requested to provide information as to their intent to comply with the Arab boycott, what do you do? What is your response to those companies.

Secretary MORTON. Let me ask Mr. Hull, who is the Assistant General Counsel for the very area in the business that handles those reports to respond to your question and give you as much detail as you would like.

Mr. HULL. Yes; sir.

These reports are aggregated into statistical data——

Mr. SCHEUER. Forget the aggregation. What do you do with firm "X" that notifies you they have been approached by the Arabs to comply with the demands of the Arab boycott?

Mr. HULL. It would depend if the nature of the request were one involving trade with Israel, or one that would involve, as has been true

in very few instances, an ethnic or religious type discrimination request.

Mr. SCHEUER. Supposing it were that, or supposing it were their request for American company "A's" commitment not to do business with American company "B" as a condition of doing business with that particular Arab group if American company "B" were allegedly doing business with Israel; in other words, the classic secondary boycott that is a flagrant violation of our Federal Trade Commission regulations on fair trade.

Mr. HULL. Your two examples are mixing what we would consider to be two different issues.

Mr. SCHEUER. OK.

Mr. HULL. There is the religious type question. For instance, and as I say, we have encountered, to the best of my knowledge, five of those, if it is a religious question we would report this to the Department of Justice immediately for full investigation and also to the Department of State.

Mr. SCHEUER. Now, what do you do with those responses that simply state that they have been asked for information? What do you do with those firms? What is your response to those individual firms?

Mr. HULL. Well, we don't respond to the firms because the firms are not writing us for advice. They have already been told by us what the U.S. policy is.

Mr. SCHEUER. How have they been told by you?

Mr. HULL. We have regulations which contain the statement of policy of the Congress and under the Secretary's signature a personal urging on the part of the Secretary that firms not comply with the boycott-related type requests.

Moreover, the form on which these firms will report the boycott-related request will have at the top of it the statement of policy of the United States again urging and requesting these firms not to cooperate with it. So that to add a response when we receive the report would really be futile because we have already advised them of what the position is and what the Secretary of Commerce's position is.

Mr. SCHEUER. You don't get in touch with them and tell them it would be against the public policy of the United States for them to comply with the demands of the Arab boycott?

Mr. HULL. Well, I would like, if I might, sir, to show you for the record a copy of the form and you will note that the form itself has this statement.

Mr. SCHEUER. Could I see a copy of the form?

Mr. HULL. Yes, sir. As a matter of fact, it was attached to the letter to Chairman Moss dated July 24, but I will be happy to give you an additional copy, if you wish.

Mr. SCHEUER. Yes.

Mr. HULL. I would like to read the form at the very top which says:

> Important. It is the policy of the United States to oppose restrictive trade practices for boycott fostered or imposed by foreign countries against other countries friendly to the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take but are not legally prohibited from taking any action.

Mr. SCHEUER. May I interrupt you there. Do you know of any other form in which the United States urges a person or a corporation not

to do something that is inconsistent with the public policy but in the same sentence tells them it is not illegal for them to do that? Our Government urges people to buy bonds or to do other things yet don't we tell them in the same sentence that they don't really have to do it, that the request isn't legally binding. When you tell them your request isn't legally binding, isn't that sort of winking at them, and signaling them that you don't really mean it?

Mr. HULL. If we were to mislead them into thinking it was legally prohibited, we would have been inaccurately describing the law. Since the law does not prohibit them, we thought it was fair and straightforward to tell them so.

Mr. SCHEUER. When a company reports to you that they have been approached by the Arabs to conform with the boycott, they get no further word from you that this would be against public policy other than that printed form with the inherent wink in there that you have just read?

Mr. HULL. That and the fact that 15 Code of Federal Regulations contains a reprint of our regulations which also makes that statement.

Mr. SCHEUER. Let me continue. You don't seem to want any information from those companies who have notified you that they have been approached by the Arabs. How about the companies that are doing business only with the Arabs and the other companies that are doing business only with the Israelis? For example, companies that are doing business with the Arabs but not with Israel like Chase Bank, Exxon, Texas Institute——

Mr. MOSS. Mr. Scheuer.

Mr. SCHEUER. Can I just finish my question, Mr. Chairman?

Mr. MOSS. Yes.

Mr. SCHEUER. Do you ask them whether in their opinion the effect of the Arab boycott is to inhibit them from carrying on trade with Israel and do you ask companies like Motorola, Xerox, Zenith, Coca-Cola, Revlon, and others who are doing business only with Israel whether the effect of the Arab boycott is not to diminish the trade that they could do and would like to do with the Arab companies and whether as a result of the boycott there is not a significant diminution in the amount of our total foreign trade?

Secretary MORTON. Well, I sent a letter to 30,500 different firms and if those companies that you mentioned were in those 30,500, I would assume they were. I can give you the list of the 30,500 we sent to inform them of this policy. So I really don't think that just as a practical matter there are very many significant exporters who don't know what the policy of the United States is.

Mr. SCHEUER. No; but have you asked what the result of the Arab boycott has been to their business and therefore to total U.S. foreign trade?

Secretary MORTON. No; we have not. This is beyond the scope of our obtaining information, but we do monitor all aspects of foreign trade as you know.

Mr. MOSS. The time of the gentleman has expired.

The Chair recognizes the gentleman from Texas, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. Secretary, your statement that you read and the opinion from the Justice Department I thought was not only comprehensive but I

thought it was conclusive. I appreciate your putting your conclusions in the record because being a member of the Cabinet, being a former Member of the Congress, I have the utmost respect for your work as the Secretary.

Let me ask you one thing, Mr. Secretary. You served for many years in Congress. Can you remember any time while you were in Congress that a Member of Congress or a member of the President's Cabinet was required by Congress to go back on his word and to reveal information that was obtained confidentially?

Secretary MORTON. I certainly have no recollection of it.

Mr. COLLINS. Nor do I. In my home area the greatest thing we can say about any man is his word is as good as his bond.

Now, being in the Commerce Department you are familiar with the laws we have passed recently here in the Congress and this whole subject seems to me to be most strange to be coming before this Commerce Committee because just a few weeks ago in Congress we passed a law authorizing secondary boycotting. In other words, this Congress authorized secondary boycotts. In fact, on this committee nine members of this committee voted in favor of secondary boycotts. Five voted against it but nine of the members of our committee said that secondary boycotts in the United States were permissible, authorized, and they encouraged them. It just is beyond my capabilities to understand why we are trying to pass judgment on foreign countries on secondary boycotts.

Secretary MORTON. Well, this is a very emotional issue and I fully understand the position that you and the chairman and members of this committee are in, Congressman Collins, and I think it is perfectly proper that you address yourself to the issue.

I am rather glad and hopeful that perhaps this legal question can be decided in a court at a high level because I think we have here an honest difference of opinion. I am sure the chairman can fully sympathize with the fact that I would weigh the Attorney General's opinion higher than any other legal opinion in my position as Secretary of Commerce. I think he studied carefully this history of this legislation and the history of 7(c) and the fact that it was reenacted twice, and here we are. I don't want to change the rules of the game because I think it would be very harmful to the relationship between Government and the whole economic community.

The problem is, too, that if we disclose this information here to your committee, Mr. Collins, we will have other requests for this. This would have to be disclosed to several committees of Congress and it is a stack of papers 8 or 10 feet high so there would be a lot of obvious staff analysis of all of these papers. This would result in probably 200 or 300 people having access to this confidential information which even though we all try I think we would all recognize this would be a pretty tough proposition to keep confidential. So that is where we are.

Mr. COLLINS. Mr. Secretary, I am glad to hear you say you are prepared to carry this on to the court because I believe it is of major importance what you are doing and the principle for which you stand and even more so when this issue is being raised over secondary boycotting which we in Congress—not we, but others in Congress—have passed.

I am against secondary boycotts but this Congress has said that in the United States secondary boycotts are permissible.

Let me ask you, did the Commerce Department assure exporters that these reports would be kept confidential?

Secretary MORTON. Well, the law says they would be kept confidential. We are dealing with a law that is existent, a law that is a statute of the United States, and the law says they will be confidential. It is right on the form and in section 369.2 of our regulations. We say that on this form from which we have just read, and not only do we state the policy of the Department opposing or the Government opposing these boycotts based on any kind of ethnic or religious grounds, but also we say information furnished herewith is deemed confidential and will not be published or disclosed.

Mr. COLLINS. Now furthermore with the release or disclosure of these reports which would reveal the names of the companies involved, would this impede the Department's ability to collect data and information for other programs?

Secretary MORTON. In our judgment, it would impede it, yes, sir.

Mr. COLLINS. On this matter if the Arab countries did not purchase goods from American producers, could they acquire comparable materials in other countries in most cases?

Secretary MORTON. The Arabs are very little dependent on us for goods and services and I can name nothing that the Arabs could not buy in the competitive world market from other countries that they are now buying from us.

Mr. COLLINS. In other words, if we had limited them, we would have simply denied American business selling the goods but the Arabs would have been able to get the material anyhow?

Secretary MORTON. Most of the judgments we have in the Department would indicate that we would lose the business.

Mr. COLLINS. On what basis, Mr. Secretary, did you determine that the disclosure of these export reports are not in the national interest?

Secretary MORTON. Well, I think maintaining foreign trade is in the national interest and I think that if you disclosed these reports you would be inhibiting foreign trade. I listened to the argument of the gentleman from New York very carefully and I think this might be a theoretical argument there but from a practical point I think if you disclosed this information you would have a very, very severe impact on the general welfare of American business and certainly on our foreign trade.

Mr. COLLINS. Following that up, does the filling of a report by a company necessarily mean that it is complying with the Arab boycott? If they just filed the report, does that mean they are complying?

Secretary MORTON. No; it does not indicate that they are complying. They just file a report that they have been contacted for information or a request has been made involving the boycott. There is no evidence that they are complying unless they choose to tell us voluntarily.

Mr. MOSS. The time of the gentleman has expired.

The Chair points out that the question really is not before this subcommittee as to the substance of the matter here. We are instead dealing with the compliance with a subpena that was voted by all members of this subcommittee but one.

Secretary MORTON. I didn't hear you, sir. Would you repeat?

Mr. MOSS. I said the Chair merely wants to emphasize that the question of boycotts is not the main theme here today, it is compliance with the request of the Congress through the issue of a subpena duces tecum for information which the Congress requires. That is the specific theme of these hearings and it is a very important question.

The Chair would point out that interestingly enough it has been found by the executive branch not in the public interest in several other investigations on this Hill to supply information to the Congress. Over the last few years, the executive branch has found that it has been not in the public interest to supply the American people and the Congress with highly relevant data. And the Chair for one has become increasingly impatient with a pattern of executive arrogance that goes on and on endlessly.

Mr. Secretary, you observed that it would be available to 200 or 300 people on the Hill. How many in the Department of Commerce go over this enormous stack of material?

Secretary MORTON. I don't think it is a question of the number of people that it takes to analyze it; but rather the number of people that would have access to it.

Mr. MOSS. Well, we have people as trustworthy. As a matter of fact, I have an easier time getting a document out of your Department surreptitiously than I do with a committee of the Congress.

Secretary MORTON. You said it, Mr. Chairman; I didn't.

Mr. MOSS. I merely pointed it out because as I once observed when I chaired for many years the information committee that when I wanted information in Washington, all the forces of Heaven and Hell could not stop me from getting it ultimately. And I assure you that will be the case here.

The Chair recognizes the gentleman from Connecticut, Mr. Moffett.

Mr. MOFFETT. Thank you, Mr. Chairman.

Least there be any question, Mr. Secretary, that there is not broad ethnic representation here, I want you to note that I am the only Arab-American member on the committee.

In reference to Mr. Collins' statement—I can think of an example of where we acquired information from the executive branch after we agreed to keep it confidential. It seems to me on the Federal Trade Commission natural gas matter falls into that category.

Second, in this case the American firms know that release of submitted information is subject to the Secretary's discretion. They know before submitting the information that there is a very real possibility that it can be released.

Third, there is no guarantee of course that the Congress, which has a right to the information, is not going to release it.

Mr. Secretary, you have acknowledged that we do have legislative responsibilities in this area. However, we can't carry out those responsibilities without knowing the companies' names that were asked to comply with the boycott. I think the chairman has stated it very well.

In your testimony you mention embarrassment that might come to these companies and the pressure upon them. Doesn't the right to know, at least the Congress' right to know—the only elected representatives in the Government—doesn't our right to know really out-

weigh that embarrassment? Is it really a Department of Commerce function to protect firms from embarrassment in situations like this?

Secretary MORTON. This is not a question of the Department or the Secretary protecting the firms. This is a question of the Congress protecting the firms. The language is just as clear as it can possibly be and the history of the legislation.

Mr. MOFFETT. Mr. Secretary, the nodisclosure language don't mention Congress. The Congress is not mentioned in the statute.

Secretary MORTON. Well, the word is "disclosed." The only thing I can say is that the Attorney General and the Department of Justice having certainly studied the legislative history——

Mr. MOFFET. In other words, your view is that you should not disclose it outside of the agency even to Congress; is that correct?

Secretary MORTON. That is correct.

Mr. MOFFETT. Can you disclose it to the President?

Secretary MORTON. I think if the President would ask for it I would have to ask my attorney but I think we could.

Mr. MOFFETT. Is it fair to say that U.S. Mid-East policy is to be friendly to both sides. I think you will see why this is relevant in a moment.

Secretary MORTON. It is obvious that we have been in a very, very sensitive position of trying to bring a long-term peace settlement in the Middle East and I think you have to do this by being fair and open to both sides.

Mr. MOFFETT. I know we both agree on that. Now, if the Arab countries want to boycott Israel, there is not much we can do about it, but it seems to me there is something we can do to preserve our neutrality. But when American firms are involved, it becomes a "secondary boycott." We don't want to be in the position of an accomplice to that kind of a boycott, do we?

Secretary MORTON. I don't think as a Nation we are. I think it is clear that the policy of the United States is in opposition to it.

Mr. MOFFETT. Well, this Department of Commerce cover letter goes out with tender offers.

Part of case tender No. 675, on the second page, is general terms and conditions, No. 13, country of origin. "The tenderer shall not incorporate in this tender"—it is very blurred here—"but should not incorporate in this tender any material that has been manufactured in Israel or by companies boycotted officially by the Iraqi Government."

Now, in this situation, by putting a Department of Commerce cover letter on that without any disclaimer, aren't we really serving as an accomplice in what is the secondary boycott?

I don't want to get into a prolonged debate on what is or is not a boycott. But I think the issue of our Government assisting in this boycott is really wrong.

Are you familiar with the cover letter I am referring to?

Secretary MORTON. Well, that cover letter has been superseded by actually stamping the information on the form itself.

Mr. MOFFETT. When did that happen?

Secretary MORTON. Well, let me see. It is the first of the month of September. The first of September.

Mr. MOFFETT. What brought about that change?

Secretary MORTON. Well, it insured that the information would be on the form, that whoever filled out the form would have the information stamped on it. It was a simplifying administrative procedure and it was a surer way of getting the information there. If the form got separated from the covering information or there was a clerical error on the information, we could not be as sure of having the information right there in front of the recipient as this stamp.

Mr. MOFFETT. I think the rubberstamp may be the correct term because it seems to me we are rubberstamping this thing.

Secretary MORTON. The issue is not whether we are boycotting or not boycotting. The issue is whether I am obeying the law or not, and I think I am.

Mr. MOFFETT. With regard to that, Mr. Secretary, I have heard the chairman cite portions of the Library of Congress study. I can understand your inclination to go with the opinion of the Justice Department but I think you should look at the Library of Congress' legal opinion. I assume you will. Could you respond to that memorandum?

Secretary MORTON. We certainly have taken a look at it, both counsel here have, and I am sure they have discussed it with people from the Department of Justice. It is very difficult suddenly going out and trying to find an opinion that sort of fits the moment. I think what the Secretary has to do is take a firm position on what the law says, get the best interpretaion that he can of the law and have consistency in that area.

I think perhaps that we will probably see a court decision on this and also this committee may instigate or may start proceedings marking up amendments to this act. If what we are doing here is not in the best interests of the Congress, and it does sort of impinge on foreign policy, here you are. You have a chance to change it.

Mr. MOFFETT. I know you are sincere in this effort but we cannot markup the amendments without that information.

Mr. MOSS. The time of the gentleman has expired.

The Chair recognizes the gentleman from Illinois, Mr. Madigan.

Mr. MADIGAN. Mr. Secretary, I think at this point the record of this subcommittee contains very clearly the majority legal point of view on this question and I think it would be instructive now if on behalf of Mr. Collins and myself and the other minority Members that the minority legal opinion of the subcommittee were also inserted into the record.

Briefly, I am going to read that to you and you can comment on it. It has been suggested thus far in the hearings this morning that there are two types of statutes that control this situation.

Mr. MOSS. I have not seen any legal opinion from the minority. The time to have raised that point was at the time that the vote was taken on the issuance of the subpena. As much as the Chair wants to be fair, he does not intend at this time to get into those matters which are more appropriate to a continuation of this hearing for the purpose of discussing alternatives which may be available to the committee. You have 5 minutes which will accord to the germaneness rule of this House which will be interpreted by the chairman who is perfectly willing to assume the responsibility which the committee has vested in him.

Mr. MADIGAN. Well, notwithstanding the fact that this seems to be the imposition of a gag rule on the minority, Mr. Chairman, I won't pursue that in that manner. I will suggest to you that there are three possible statutes that could be applicable to this situation this morning; that is, statutes that fall in three different categories—first being those statutes that strictly limit access to the information to the request made by specific committees and subcommittees of Congress or made through specific procedures. Income tax returns under 26 U.S.C. 6103 and information filed under section 210 of the Investment Advisory Act of 1940 would both be examples in this first category.

Second, there are categories of statutes vesting authority of over all disclosure in the discretion of the executive officer of the administrative agency as guided by standards such as national interests and are silent as to any other standards or facts.

Third, some statutes vest authority over disclosure to the public at large in the discretion of the executive officer, the administrative agency, but expressly provide that such discretion does not authorize denial of reported information to committees of Congress having proper jurisdiction. 15 U.S.C. 1401 and 42 U.S.C. 1857 are both examples of this third category. Disclosure provisions of the Export Administration Act of 1969 which required the information reported by firms who are requested to comply with the Arab boycott fit the second category above; that is to say, the disclosure provisions expressed by the Secretary of Commerce. There is no express guarantee of the Congress to overriding the discretion as provided in the third category.

Finally, the Secretary is to supervise all disclosure by denying access unless such denial is contrary to the national interest. It should be noted that the statutes of the third category which absolutely preserve congressional access to reported information have been passed both prior to and subsequent to passage of the Export Administration Act of 1969. 42 U.S.C. 1857 was enacted exactly 1 year after the Export Administration Act of 1969.

The text of the provisions of 42 U.S.C. 1857 authorize and instruct that nothing in this section shall authorize the withholding of information by the Secretary or any other officer or employee under his control from the duly authorized committee of Congress. This unequivocally shows that when Congress intends to preserve absolutely its access it knows what words to use. Hence, it is clear that despite knowing how to draft information access provisions expressly containing an unequivocal congressional right to know that Congress has in this case, the Export Administration Act of 1969, chosen to legislate an information access policy through the executive branch with discretion over disclosure to anyone and does so in the context of a general policy not to disclose.

Thus, Mr. Secretary, I think that you are following the law as passed by the Congress of the United States and that for you to do otherwise would cause you to be in substantial violation of the law.

I thought that I should express at least that personal opinion of mine for the record this morning.

Secretary MORTON. Thank you very much.

Mr. MOSS. The Chair is not so naive as to fail to recognize a carefully prepared legal opinion. Now he will address himself to the matter of the gag rule.

The Chair instructed the counsel of this subcommittee to prepare an opinion, and also requested an opinion by the American Law Division of the Library of Congress. The opinions in both instances were made available to every member of this subcommittee, and to the Secretary, and to the Department of Justice. There was no partisan approach whatsoever. The gentleman from Illinois has read an opinion prepared by the minority counsel with the help I assume by the people downtown.

Mr. MADIGAN. Mr. Chairman.

Mr. MOSS. The Chair is going to have his say. Your memorandum has not been made available to the majority.

Let me make very clear that if there is a gag rule, it is the minority that is attempting to invoke that gag rule.

Mr. MADIGAN. Mr. Chairman.

Mr. MOSS. I pointed out before I am not naive. I have been here a very long time.

Of course, I will recognize the gentleman.

Mr. MADIGAN. Let me assure you, Mr. Chairman, that if there is any naivete existent in this room I certainly do not think that it is existent in the person who is chairing the subcommittee. The minority counsel of the subcommittee is present, and I would be willing to have you swear him under oath——

Mr. MOSS. The Chair has no intention of going into such an exercise at this time.

The Chair will recognize the gentleman from California, Mr. Waxman.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. MADIGAN. Mr. Chairman, if I might proceed.

May I finish? I was in the middle of a sentence.

Mr. MOSS. The Chair said that he was not going to swear any member of this staff and of this committee.

Mr. MADIGAN. Let me comment, Mr. Chairman, for the record that the minority counsel did not prepare this document.

Mr. MOSS. I said it was quite possible it was prepared outside.

Mr. MADIGAN. It was prepared by me.

Mr. MOSS. I hope you know who you consulted with. I think that is a matter of your own judgment.

Nevertheless, the Chairman now recognizes the gentleman from California, Mr. Waxman.

Mr. WAXMAN. Mr. Secretary, I am trying to make some kind of sense in my own mind about exactly what the position is of the Department of Commerce regarding the whole question of the Arab boycott. Now, in the last couple weeks it was reported in the press that the Commerce Department was distributing to businesses a statement of information about the boycott furnished by the Iraqi Government. In other words the Department of Commerce was helping to implement the boycott policy of other governments.

Now, we have this question before us of requests by Congress to get information from the Department of Commerce about an enforcement of the law.

As I read this section, the section says that the Secretary can withhold this information if he feels it would not be within the national interest to disclose the information. It is not in the national interest

to disclose this information because (1) it will inhibit foreign trade, (2) it might subject these businesses to a counterboycott, and (3) the Department of Commerce feels that if you break the confidence you will have difficulty getting businesses to cooperate with the Department.

Now, I am trying to figure out what all this means when this is being raised to us as a matter of national concern superseding the right of Congress, the Representatives of the people, to know what is going on and to further our deliberations to find out what other legislation may be needed.

Now, with regard to the question of breaking the confidence of those businesses who might otherwise not comply with the law, aren't we talking about compliance with the law? This is not based on volunteerism by business, it is based on the fact that Congress says they have to file this information and it is not whether they would like to or not. I am very disturbed about this because it really goes to the whole question of the attitude toward the boycott itself by the Department and I think it goes to the attitude by the whole administration. I mentioned this in relation to an experience I had earlier this year. I went to Saudi Arabia. I was turned down on a request for a visa. I went to the State Department and only after they interceded on my behalf did I get a visa. Had I not been a Member of Congress, I would have been told that the policy was not to give visas to Americans who happen to be Jewish. In Saudi Arabia I was informed we don't send our business personnel there, we don't send our Foreign Services personnel there if they are Jewish. We in fact cooperate with an Arab boycott.

If we are going to cooperate with an Arab boycott, then I think that what we are saying in effect that we are giving a clear signal to go ahead with the continuation of the discrimination against our own citizens. You know in Saudi Arabia they don't allow women to drive, there is a discrimination against women. Are we going to acquiesce if the Arab leaders say to us we ought to discriminate against the women in this country? If we don't draw the line, where will it end? It is a clear signal that this country is going to acquiesce in it because, one, we are told otherwise it might inhibit business, two, it might wreck the confidence that business might have with the Department in complying with the law, and, three, that companies participating in a boycott might find themselves subject to a boycott. Is a boycott under one set of circumstances fair and under another unfair?

These are the problems I wish to raise with you involving not just the legal questions because as far as I am concerned on the legal aspect, I am ready to vote to hold you in contempt. But, I am interested in the policy of the administration on this whole issue as well as the Department's.

Secretary MORTON. Let me just maybe add one thing to what we have said here. In cases where there is an implication of discrimination against Americans on the basis of religious affiliation or ethnic identification, we ask the Department of Justice to investigate these implications as soon as we know of them and we turn this information over to the State Department to use its good offices with the government of the boycotting country.

The State Department has scored at least one spectacular success in this area. They made such a presentation to a high ranking officer in the Government of Jordan and they were told in unequivocal language that such a distortion of the boycott was in fact contrary to Government policy and that steps would be taken to avoid repetition of the episode. So, wherever we have a discrimination case that we know of, that is, whenever we have valid evidence, we turn that over to the appropriate agencies, the Department of State and the Justice Department, to pursue it. We have had five such cases that have been turned over and I think our people are on the alert for them not only through the reporting system, Mr. Waxman, but also through all other contacts with industry.

There is one thing I want to leave in your mind and in the minds of this committee. I am in no way, shape, or form in sympathy with the boycott. I can't change the law to fit an individual case. If I took the law in my own hands and decided, well, we are going to interpret this a different way than it was interpreted before, we are going to interpret it a different way than the Attorney General and the Department of Justice does it and I did that every time an emotional issue came up, we would have chaos in this country.

Mr. WAXMAN. I am not going to ask you about bringing chaos in this country. I am asking you to enforce the law as I see it.

Secretary MORTON. Well, I have to enforce the law as you wrote it.

Mr. WAXMAN. Why do you think the Congress adopted a law indicating that a boycott is contrary to the principles that you express are in violation of our whole country's substance, and then not even allow Congress to have that information about whether the law is being enforced and whether the companies are filing and complying with the law? We need that information to know whether we need to do something more. Now, to say that you are not sympathetic to the boycott is all fine and good, but the effect of all this is to say we are going to wink at those who want to have a boycott, we don't like it but what can we do, we cannot change the world.

Let me just tell you, Mr. Secretary, that what we are going to have is a clear signal to escalate a boycott not just against Israeli-made goods or services or against businesses that have some affiliation with Jews, but we are going to find it being applied to Catholics and others. We are going to find it applied to other minorities later because there is no way to draw the line then unless we draw it at the very beginning.

Secretary MORTON. We have had the problem of boycotts between belligerents for a long time. We have had the whole question of Rhodesia. I am sure that certainly we have the capacity and the ability as a trading nation to come out of the problems here, particularly if there is a good settlement in the Middle East which has been the drive of our Nation. I don't know of anyone who has spent as many hours as Secretary Kissinger has in trying to develop a peaceful solution in the Middle East that will lead to open trade and that will lead to the kind of coexistence that you and I think ought to be there. The question here is the question of whether or not I am carrying out the law, not as you interpret it, but as it was put on the books.

Mr. MOSS. The time of the gentleman has expired.

The Chair recognizes the gentleman from New York, Mr. Lent.

Mr. LENT. Thank you, Mr. Chairman.

I would like to say at the outset that I was one of the majority of this committee that voted for the issuance of this subpena for these documents. I feel it is very important that the Congress learn as much as it possibly can as to how well our public policy is being carried out. This policy, of course, is opposed to restrictive trade practices or boycotts as they are called. I want to commend the Secretary for, in my opinion, very substantially complying with the terms of that subpena. As I understand it you have furnished or are about to furnish this committee with practically everything we asked for save the specific identity of the commercial firms which you feel are protected by section 7(c) of the Export Control Act; is that correct?

Secretary MORTON. And section 369.2 of the regulations issued pursuant to section 7(c).

Mr. LENT. So while we can speculate as to whether the boycott is right or is wrong, the specific issue that this committee is about to be faced with, as I understand the parliamentary situation, is whether the Secretary is going to be punished for failure to furnish the last item; namely, the specific identity of companies.

It seems to me that what we are trying to do here is to fault the Secretary for obeying a law enacted and reenacted and reenacted again by the Congress of the United States. It would seem to me that, as much as I would like to get this information and all of it because I am opposed to this Arab boycott, this committee in my opinion is not above the law, Mr. Chairman. We are as much bound by this law as is any citizen of the United States and as is any Secretary of Commerce or any member of the Cabinet of the United States.

I don't think that we can attempt through this subpena device the punishment—that is, the failure to comply exactly to that subpena, to put ourselves above the law. Otherwise, we fall into the same sort of trap as we were criticizing the executive department of the Government just a few months ago.

Now, I would say this: That if the Congress does not want itself bound by the confidentiality requirement of section 7(c) of the Export Control Act, we could say so. I would like to offer right now to introduce, and I would like the chairman of the committee to cosponsor, an amendment to section 7(c) which would permit the Secretary to make a full disclosure without violating the law.

Mr. MOSS. Would the gentleman yield?

Mr. LENT. Just a second. If the chairman would be good enough to cosponsor that amendment with me, I am a member of the minority although we have been accused here of trying to run the committee. I don't think that really makes much sense in watching the give and take here.

With the chairman's obvious legislative expertise and the fact that he is a member of the majority party, I think we could probably get that bill through in very quick order and then we could come back here and perhaps do something productive instead of indulging in this demonstration of moral indignation, righteous outrage, and histrionics.

I now yield to the chairman.

Mr. MOSS. The Chair will wait until the gentleman has concluded in the pursuit of his own time.

Mr. LENT. I would like to ask the Secretary if we were to attempt to amend, as I have suggested, the Export Administration Act so as

to direct the Secretary of Commerce to make these documents available to us, would the Secretary be in opposition to that or would he support that?

Secretary MORTON. My concern would be, before I would make the decision, as to what effect this would have on our ability to get information from the business sector, from the private sector. This is not the only area where we get a great deal of confidential information. A great deal of confidential information is developed by the Bureau of the Census, by our Bureau of Economic Analysis and the analysis of those pieces of information results in forecast statistics and all the other general information that we publish. So you have the fundamental question.

Now, this area is all wrapped up in an issue that is emotional at this time. What will it be next year and the year after that is the question you would have to ask. I think that Congress itself would be doing a lot of harm to itself and to our ability to develop comprehensive information, if we did not have any system of protecting proprietary information received from those people.

So, I would reluctantly approve it; if at all, and I would probably conclude that it was not in the best interest of the country to have such an amendment which would set a precedent really for not only disclosure of proprietary data relating to exports but also their business sensitive information that is considered by most people as proprietary.

Mr. LENT. Thank you, Mr. Secretary.

Mr. Chairman, I just want to say in conclusion that with all due deference to the young attorneys at the Library of Congress who have written this opinion and with all due respect to distinguished counsel for the majority who have also given an opinion which would indicate that the Secretary was required to furnish us with the names, I am very much persuaded by the ruling of the Attorney General here, much as I would like to get this information. Attorney General Levi is an eminent legal scholar, former dean of Chicago University Law School. I don't think there is probably anyone in the legal field in the United States who enjoys a reputation as good as his in the legal field, and he indicates that Congress explicitly in 1956, and even in 1962 after you had your bout with the Secretary of Commerce in 1961, passed up an opportunity to amend section 7(c) even though there were amendments offered by various Members of Congress that would have committed the Congress to get at this confidential information. Having failed to enact or pass those sorts of amendments it would seem to me that we are in a very uncomfortable position in trying to force a member of this Cabinet to disobey a law which we have enacted and re-enacted on several occasions over the years.

Mr. MOSS. The gentleman's time has expired.

The Chair recognizes himself at this point.

Mr. LENT. Mr. Chairman, I think the regular order because——

Mr. MOSS. The regular order permits the Chair to speak whenever he wants to be recognized and he is now recognizing himself to address himself to a suggestion which in ludicrous on its face.

If we were to start in to deal with over 100 statutes that I am familiar with that would have to be amended to state an affirmative right of the Congress to access, we would spend the balance of this session rewriting many statutes which clearly do not apply to the Congress.

The Chair has no intention of cosponsoring any legislation which would take the Attorney General's opinion and give it any validity whatsoever. The Attorney General has a very poor batting average in his opinions on matters of information, in his opinions on the matter of Presidential powers to withhold certain things. The courts have been rather busy in striking down those opinions and those claims of privilege that have gone on I guess continuously for the last 3 years.

Mr. LENT. Mr. Chairman, I think you are confusing those situations——

Mr. MOSS. The Chair is not confused and the Chair does not recognize the gentleman from New York.

The gentleman will address the Chair when the Chair is finished and not until then.

The finding of the Secretary if very clearly this, because this is the only finding that he can make, that it is not contrary to the national interest to create a confrontation with the Congress? To put the legislative and executive branches at odds with each other. That is the finding of the Secretary. That is the finding you want us to follow? It is not contrary to the national interest to have a continuing deterioration in the relationship between the Congress and the executive branch of the Government?

Well, in my opinion, it is clearly contrary to the national interests to have such a confrontation. This is not a moment I enjoy, but nevertheless and notwithstanding the fact that the minority seems intent upon always supporting the Executive.

The gentleman who appears here as Secretary of Commerce knows full well that when I chaired the Information Committee during his time in the Congress, and during the administration of a Democratic President, I gave them as much hell for the withholding information from Congress as I propose to give you, sir. And I didn't draw the line because of the politics of the man in the White House.

I think that we have to have finally a standup Congress that says we are an equal branch. If there is a dominant branch it is this, the people's House, and not downtown at the White House. That is something that seems to be forgotten. I share the advantage of the Secretary of not being a lawyer in this instance, but I point out that the Constitution was not written primarily by lawyers.

The Chair recognizes the gentleman from Indiana, Mr. Sharp.

Mr. OTTINGER. Would the gentleman yield?

Mr. SHARP. I am happy to yield.

Mr. OTTINGER. I think the point that has been made by you, Mr. Secretary, and reiterated by the minority, simply is not well taken—that we are asking you to violate the statute. First, the statute says you shall not "publish or disclose" and those two words have to be taken together in context, it seems to me, which means released to the public. We are only asking you to furnish necessary information to the Congress, to this committee, so that we can proceed with our business.

Second, the law quite clearly provides that you may disclose this information if you determine that it accords with the national interest. It is very hard for me to understand how you have determined that furthering the Arab boycott is in the national interest. These are two

legal bases on which you ought to furnish this information. Your finding that withholding the information is not contrary to the national interest, that furthering the boycott is not a violation of the national interest, it is particularly serious matter, it seems to me.

Now, I would like you to comment directly on these two critical points.

Secretary MORTON. I think the primary issue, Mr. Congressman, is the issue over the exercise and the discretion that the Congress has given me clearly and distinctly. We have no executive privilege here. I have never asked for executive privilege. This is not a criminal proceeding.

Mr. OTTINGER. But you have decided that it is not contrary to national interest as a matter of your discretion to withhold this information as a matter of policy of this administration?

Secretary MORTON. That is correct.

Mr. OTTINGER. To further the Arab boycott?

Secretary MORTON. No; to disclose the information. I don't think we can rationalize the disclosure or nondisclosure of information——

Mr. MOSS. Would the gentleman yield?

Secretary MORTON [continuing]. Will further the Arab boycott. This is information that is proprietary information, most of which does not concern itself with the Arab boycott in that this is only a reporting of the requests that have been made to an individual forum for information or to participate but there is no implication that these companies have done so, and the question, what would we gain by disclosing this information? What would there be gained?

Mr. OTTINGER. Well, what would be quite obviously gained is that it would permit this committee to exercise intelligently its oversight responsibilities and to make the determination in Congress whether or not the policies of the United States as determined by Congress are being carried out.

Secretary MORTON. Well, we have given you all of the information that you need to do that. You get all the information as to the number of requests, the type of requests—everything but the name of the firm.

Mr. OTTINGER. That is the essence of the imperial Presidency, because you are making the determination of what we need.

Secretary MORTON. No; it was the essence of the law.

Mr. MOSS. Will the gentleman yield?

Mr. OTTINGER. I would be happy to yield to the Chair.

Mr. MOSS. The material the Secretary has offered deletes the identity of the firms and the details of the commercial transactions involved. Now, if we want to determine if a firm's securities are traded on American or New York Stock Exchanges or upon the Pacific coast or the Midwest or of the Boston, or any of the exchanges of this country we cannot find that out from the material offered even though this committee is specifically charged with jurisdiction over the Securities and Exchange Commission and the Securities Exchange Commission Act. We cannot find out to what extent the Department of Commerce is circulating offerings that contain clear boycott provisions which might prejudice the profitability of some companies in which the public is called upon to invest in the securities market of this Nation. That is just one example of the disability that the Congress would be asked

to operate under Clearly it would be ridiculous for us to accept your offer.

Mr. SHARP. Would the Chairman yield?

Mr. MOSS. Yes; I return the floor to the gentleman from Indiana who has the floor.

Mr. WAXMAN. Thank you, Mr. Sharp.

I think something has to really be said unless this be misunderstood by the public. We are not asking that this information be made public to the public, we are asking that this information be furnished to a committee of Congress which has not said at any point that it is going to release it to the public; that we want it for our own deliberations.

I want to raise another point that I think also ought to be clarified. On the document itself that is filed with the Department of Commerce it is stated that information furnished herewith is deemed confidential and will not be published or disclosed except as specified in section 7(c) of the Export Administration Act of 1969.

Thus, no one filing such a report can reasonably claim that he relied upon an assurance of absolute confidentiality when he filed his report and certainly not confidentiality from the U.S. Congress.

I would like the Secretary to respond to that.

Secretary MORTON. Well, there are five requests I think for this information: One from the Committee on International Relations Subcommittee on International Trade and Commerce in the House; one from the Committee on Interstate and Foreign Commerce, the full committee; and the Subcommittee on Oversight and Investigations; one from the Subcommittee on Government Information and Individual Rights of the Committee on Government Operations; and one in the Senate from the Committee on Banking, Housing and Urban Affairs.

So if you made it available for one, certainly I think you would have to make it available to all those committees. This would give it a pretty widespread——

Mr. MOSS. Will the gentleman yield?

Mr. WAXMAN. If I might say, if I understand the Secretary's position, is it now your position that you don't want this information to go to the U.S. Congress because there are too many committees requesting it?

Secretary MORTON. No; I think there is some point—what does the word "disclose" mean? I am forbidden to disclose the information, publish or disclose and this is the real question: At what point, as a practical matter, can it no longer be kept confidential. It is a tough situation if you get all this information and it applies to all kinds of companies across the board. It is a big, big stack of information and we have obtained it on the grounds that we are going to keep it in confidence as we keep so much other information.

This has been a relationship which has been guarded carefully by Secretaries of Commerce for 25 years, and I agree with the chairman. This is not a question of partisan politics, it has been the way that this information is obtained and we would not get it if we violated that.

I don't think you could for 1 minute consider the number of people who have access under broad distribution in the Congress as not being a disclosure of the information. It is a disclosure of the information, quite a broad one.

Mr. Moss. Mr. Rinaldo of New Jersey.

Mr. RINALDO. Thank you very much, Mr. Chairman.

Mr. Secretary, I have listened very patiently to the arguments on both sides, and I have in front of me the letter that you received from the Attorney General which I have read carefully. I have the opinion of the Library of Congress, and I understand full well your position particularly when the letter from the Attorney General contains the following statement:

> I conclude that the committee is not entitled to receive the reports in question unless (a) exercising discretion granted in section 7(c) you determine that withholding them would be contrary to the national interest.

I also completely agree with the chairman when he said earlier that the main issue before this committee, is "compliance with the subpena."

Now, if we go along with that statement, the issue with which we are concerned here this morning is not primary or secondary boycotts. I don't think there is anyone in this room or any member of this subcommittee who would condone the Arab effort or any effort to boycott Israeli goods or the goods of firms which do business with Israel strictly on the basis which has been alleged. I am strongly opposed to any Arab boycott. I think, however, that we have to focus on the issue. We are concerned strictly with Congress' right, with the right of this subcommittee, to obtain information under the Export Administration Act. The only question as far as I am concerned is whether you, Mr. Secretary, are on firm legal ground in your interpretation of that statute; that is, the interpretation as given to you by the Attorney General of the United States of America, and whether in refusing this subcommittee the documents it has requested you are in compliance with the law as it should be interpreted.

I see that you nodded your head so I presume that you agree with me. The telling point to my mind is the legislative history of the act. That has also been mentioned, along with the fact that Congress tried to amend this act to exempt itself from the confidentiality strictures. Why should an attempt to amend be made I ask rhetorically, if the Congress already had the right to know?

I suggest, Mr. Chairman, that under the provisions of this act Congress did not reserve to itself the right to know and the right to obtain the documents we seek. The history of attempted amendments to this act shows this clearly. I can even argue that point of law. But the solution, in my opinion, does not lie in my arguing one point or someone else arguing another point. I am not going to belittle the document that the chairman has obtained from the Lib[illegible] Congress. I believe that certainly the attorneys who prepared [illegible] opinion were just as sincere in their beliefs and their interpretation of the law as the Attorney General.

I think I for one have to admit that it appears to me that we are hung up here. You have a viewpoint, Mr. Secretary, and you are completely proper in relying on the opinion furnished you by the Attorney General. The chairman of this committee is completely proper in my opinion in relying on the document that he has which gives a contradictory legal opinion. He has received this document from a reliable source, the Library of Congress. We could go on and on ad infinitum with a lot of lawyers and nonlawyers arguing sincerely for what they believe should be the proper course of action.

In my opinion, the proper forum for a decision on a point of law where there are so many valid arguments on both sides of the issue is not here but in the judicial branch of Government. What I am going to suggest is that perhaps we should petition the proper forum, the court, for a declaratory judgment, and perhaps in that fashion get a decision that will clear this matter up once and for all by a body that is in a position to interpret the law and the conflicting legal arguments.

Mr. Secretary, if this issue were presented to the proper forum in the judicial branch, and if that forum determined that Congress did have access to that information, would you then furnish the material?

Secretary MORTON. Yes, indeed.

Mr. RINALDO. Thank you, Mr. Chairman.

At this point in time I assume from your testimony that you believe turning over the export reports to the subcommittee would be an abuse of the discretion that Congress specifies you should utilize under section 7(c) of the Export Administration Act?

Secretary MORTON. That is correct.

Mr. RINALDO. And finally for the record you believe that if you furnished the information at this point as requested by the committee you would be violating the law?

Secretary MORTON. Yes, I would.

Mr. RINALDO. Thank you very much.

I have no further questions, Mr. Chairman.

Mr. MOSS. The Chair recognizes the gentleman from New York, Mr. Ottinger.

Mr. OTTINGER. Thank you, Mr. Chairman.

I have only one further question and that is I would like to know whether the Department of Commerce is continuing to circularize business opportunities from Arab countries which contain a boycott restriction within them?

Secretary MORTON. We do circularize actual business opportunities and I have a letter in response to Mr. Graubard dealing with this issue. I think it is too long, Mr. Ottinger, to read but I would like to put it in the record at this point.

Mr. MOSS. Without objection, the letter referred to will be placed in the record at this point.

[The letter referred to follows:]

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR DOMESTIC
AND INTERNATIONAL BUSINESS,
WASHINGTON, D.C., *August 22, 1975.*

Mr. SEYMOUR GRAUBARD,
National Chairman, Anti-Defamation League of B'nai B'rith, Washington, D.C.

DEAR MR. GRAUBARD: This is in response to your letter of August 11, 1975 to Secretary Morton in which you advise that it has come to your attention that this Department recently disseminated to interested American firms a bid tender for the purchase of pre-cast buildings by the Government of Iraq which contained a provision excluding the use of materials of Israeli origin or materials manufactured by firms boycotted by the Government of Iraq.

We were quite disturbed to learn that, contrary to longstanding Departmental policy, copies of this tender and other trade opportunity documents were disseminated without attaching thereto a statement of United States policy opposing such restrictive trade practices and requesting the American firms concerned not to comply with them. Secretary Morton appreciates your bringing this matter to his personal attention. In order to avoid this occurring again, we have in-

structed appropriate officials in the Domestic and International Business Administration that henceforth a statement should be *stamped* on any documents containing such restrictive trade clauses which are disseminated by this Department. Such statement will direct the reader's attention to the particular restrictive clause and advise him of U.S. policy in opposition thereto.

Although the issue of discrimination because of race, color, religion, sex or national origin does not arise in the case you have cited and, in fact, very seldom arises in connection with an Arab boycott request, I want to assure you that tenders and other trade opportunity documents which would have the effect of discriminating against certain U.S. citizens on such grounds will not be, and to our knowledge have not been, disseminated by the Department of Commerce.

This Administration is fundamentally opposed to the premises upon which the Arab boycott is based and the Department of Commerce has made every effort to acquaint the business community with the declaration of United States policy currently contained in Section 3(5) of the Export Administration Act. The Department form on which exporters report receiving Arab boycott requests includes a statement of that policy, prominently displayed at the top of the form. Reprints of this form and of the pertinent provisions of the Export Administration Regulations were recently mailed to approximately 30,500 U.S. firms which are listed in the American International Traders' Index. A copy of this document is enclosed for your information. In addition, the Department has issued several press releases over the past few months concerning our policy towards the Arab boycott and actions taken to enforce our reporting requirements.

We do not believe that any useful purpose would be served if the Department of Commerce refused to disseminate bid invitations subject to restrictive clauses, thereby denying U.S. firms prompt access to business opportunities in the Arab markets which they are lawfully permitted to pursue. Our firms might to some extent compensate for loss of this source of information by attempting to obtain the opportunities directly from Arab sources or through private trade channels. Forcing them to do so, however, would put them at a competitive disadvantage with foreign competitors having prompt access to such opportunities through their own governments. The approach which we have chosen to use in handling these trade opportunity documents affords us the means of reminding American firms of the U.S. policy of opposition to such restrictive trade practices, before such firms have decided in the exercise of their business judgment, whether or not to comply with the particular Arab boycott request.

In conclusion, a refusal by the Department to disseminate such opportunities could have an adverse impact on our balance-of-trade, and increase unemployment in the United States without having any impact on the worldwide application by the Arab countries of their boycott against firms engaging in extensive commercial relations with the State of Israel. We firmly believe that the only means of ending this boycott rests in the successful settlement of the Middle East conflict and the issues underlying it. I am sure that you share our hope that such a settlement will be achieved in the very near future.

Sincerely,

CHARLES W. HOSTLER,
Deputy Assistant Secretary
for International Commerce.

Enclosure [not printed].

Secretary MORTON. In addition, I have a memorandum from Assistant Secretary Travis Reed. It is about six or eight pages, and it goes into this very deeply, and I would like to include it in the record.

Mr. MOSS. Without objection, that will be the order of the subcommittee.

[The memorandum referred to appears as appendix M, pages 175–179.]

Mr. OTTINGER. I would appreciate it if you would furnish a copy of those documents to my office as well.

Secretary MORTON. Be very happy to do so.

Mr. OTTINGER. I take it this is consistent with your finding that it is not contrary to the national interest to disclose the information with respect to the names of the companies to this committee at this time. While the Department of Commerce may disapprove or say it

disapproves of the Arab boycott, it is perfectly willing to further that boycott by circularizing business opportunities that contain the boycott restrictions in it and is perfectly willing to withhold from this committee information it needs, even though it furthers the boycott.

Secretary MORTON. Well, the information, of course, goes to any exporter before he has made any decision to do business. It would be very difficult as to where you cut the line. These trade opportunities exist in the order of hundreds and arrive from abroad quite frequently. It is a real question as to whether you would want to put the Department of Commerce in the business of making those selections.

Let's assume, and I think it is a safe assumption, that the vast majority of firms that are requested to participate in some way or are requested for information do not actively participate in the boycott, and therefore how do you draw the line?

It would be very hard to determine whether you would be running a boycott of your own by depriving firms of trade opportunities and that would just compound it.

Mr. OTTINGER. The policy the administration is pursuing which is also the policy which the previous administrations have pursued clearly implicates the U.S. Government in the boycott. It seems to me if our policy is indeed to oppose such practices that it is completely within the purview of the Department of Commerce to refuse to circulate any document that contains boycott instructions in it.

Secretary MORTON. Let me ask Mr. Hull to respond to that.

Mr. HULL. Congressman, the law right now, although it states the policy to oppose these types of boycott-related requests, does not prohibit American firms from answering those questions.

Mr. OTTINGER. But we are talking about a matter of policy.

Mr. HULL. Right. If we were to play ostrich, so to speak, and turn the other way and refuse to accept these trade opportunities and let the firm try to get trade opportunities through sources from abroad, we would be in a situation where we would in many instances effectively prevent the firm from trading with Arab countries, although the firm is not prohibited from trading with these countries.

Mr. OTTINGER. The U.S. Government would not be participating in the boycott this way, though and we would indicate the seriousness with which the administration viewed the boycott at the present time. The administration's failure to do so is an indication of its lack of interest in counteracting the boycott.

Mr. HULL. But we would lose an opportunity, sir, at the time the firm first learns of the boycott-related request for us to pass upon them the statement of policy which is in opposition to complying with such requests. This we can do by transmitting the opportunity with the stamp that the Secretary referred to. The stamp is going to be affixed on the document, and before the individual firm has even made a business judgment as to what it will do, it will be made aware.

Mr. OTTINGER. I have no doubt that the other policy would be a much more loud and clear signal to U.S. business and to the world and a better understood statement of administration policy—that is to say, if the administration refused to distribute those documents, the

word would be quite clearly understood that the administration was changing its attitude in a very constructive direction and really taking some action against the boycott.

I yield to the gentleman from New York.

Mr. Moss. Mr. Scheuer, if he desires to ask a question at this point.

Mr. SCHEUER. Thank you, my colleague from New York.

Mr. Chairman.

You mentioned just a moment ago that the fact that a company is filing does not indicate that it is participating in the boycott. My problem is how you are exercising your discretion on this question as well as other questions. It seems to me an abuse of your discretion not to ask companies that tell you that they are filing, not to ask them whether they intend to comply with the boycott. That should be something that your Department ought to know. I don't understand how it is possible that you have not asked those companies.

Secretary MORTON. We ask them but we have to make it clear, and maybe my lawyers here can address themselves to that, but their answer to this question is optional.

Mr. SCHEUER. You could certainly require that they answer as to whether they are complying with the boycott which you have stated repeatedly is against the public policy of the United States.

Let me mention another instance in which I think you have abused your discretion.

Secretary MORTON. Let me get the first one. There is some legal question as to whether we have the authority to do it, but I have instructed the Department to look at this to see if we can make the question about intentions compulsory, in answer to your question.

Mr. SCHEUER. It seems to me this is knowledge that you should have and that you should try to have. Why have you used your discretion to cloak with a shield of secrecy not only the companies that have filed their answers and what they intend to do but also the companies that have flagrantly refused to file, that are stonewalling you and the Congress? They have not provided information which is covered by your confidentiality. They have refused to file this information. They are stonewalling. Why have you protected a company like National Cash Register that was informed by you in 1965 and 1966 of the requirements of filing? There was a form issued again by your Department in 1968 and 1969 of the requirements of filing. They were informed again by your Department earlier this year of the requirements of filing, and they are represented by an expensive array of lawyers who surely have advised them as to their legal obligation to file and they are still stonewalling it. Why have you given them the powder puff treatment?

Secretary MORTON. I turned that over to the Department of Justice and if they prosecute it, fine.

Mr. SCHEUER. I didn't know that. The information that we have is you gave them a $1,000 administrative fine which would mean nothing.

Secretary MORTON. Well, the Department of Commerce cannot set a fine.

Mr. SCHEUER. Has this case been turned over to the Justice Department?

Secretary MORTON. We handled that one administratively I am told.

Mr. SCHEUER. Have you sent any case of stonewalling by corporations, of flat outright refusal to file, over to the Department of Justice?

Secretary MORTON. We have referred some cases to Justice on ethnic and religious grounds.

Mr. SCHEUER. How about the refusal to file which is a flat violation of a criminal statute? Have you ever turned one of those cases over to the Justice Department?

Secretary MORTON. We have used administrative proceedings against the firms that have failed to report and if we found that any such firms repeatedly ignore our reporting requirements we could turn them over to the Department of Justice.

Mr. SCHEUER. Well, you have been failing with the National Cash Register Co. for 10 solid years and they have been warned and notified year after year after year. They have among the finest array of legal talent in this country. Don't you think if you turned that file over to the Department of Justice, it might induce them to file, and also would have a powerful, let us say, preventive medicine effect on the thousands of other firms in this country that have likewise stonewalled and refused to file? How can you justify not ever having turned over a single case of stonewalling, of refusing to file after repeatedly being informed by your Department? How can you justify never having turned a single case over to the Justice Department?

Mr. HULL. If I may answer that, sir. First, there is a little confusion. We have never had a case of a firm refusing to file. In other words, we have never had a case where we contacted a firm and said, "It has come to our attention that you should have reported a particular transaction and we want you to report," and they refused to. So, "refusal" is misleading. What we have had——

Mr. SCHEUER. Now, wait a minute. When you don't file your income tax returns for 3 or 4 years, it is no excuse for you to say, "Well, they never asked me to file." You are under a legal obligation to file, and if that is not filed that is a clear violation of criminal statute.

Mr. HULL. That is quite correct.

Mr. MOSS. The gentleman's time has expired.

The Chair recognizes the gentleman from New Jersey, Mr. Maguire.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Mr. Secretary, I note in your correspondence with Chairman Staggers that you——

Mr. MOSS. Would the gentleman yield at that point?

Mr. MAGUIRE. Surely.

Mr. MOSS. The Chair will make a correction in the number of requests the Secretary listed as being before him for this information. He duplicated one and there are only four. The Committee on Interstate and Foreign Commerce issued the subpena upon a vote by this committee in accordance with the rules of this committee, so you would have four rather than five pending requests. This is the only request made under compulsory process utilizing the subpena duces tecum.

Secretary MORTON. I may have been in error. I am sorry, Mr. Chairman. I thought that Congressman Staggers had signed the subpena.

Mr. MOSS. He did that, the rule of the committee. Look at it and you will see that the subcommittee votes, the full committee signs the subpena.

I thank the gentleman for yielding.

Mr. MAGUIRE. Thank you, Mr. Chairman.

Mr. Secretary, in your correspondence with Chairman Staggers dated August 22, 1975, you indicate that one of the reasons that you are withholding the information from the committee is the possibility of economic pressures from domestic consumer groups which might result if the identity of the firms were to be disclosed. Is that a legal argument, Mr. Secretary?

Secretary MORTON. Well, I think it is a very practical consideration.

Mr. MAGUIRE. Is it a legal argument?

Secretary MORTON. I don't know. I am not a lawyer. I don't know. I think it is a commonsense argument and it is certainly part of the input that you would have to use to make a determination as to whether this was in the national interest or not.

Mr. MAGUIRE. Presumably you are taking a position on the law in not complying with the subpenas here this morning and I gather you are saying in effect that this matter of possible consumer reaction is not part of the legal brief.

Secretary MORTON. Well, we interpret the law as saying that we have the discretion to make the determination of whether it is in the national interest to make this disclosure and I think you have to use a lot of judgment as to what is in the national interest and what is not and you have to determine what the likely effects of such a disclosure would be on various sectors of the society and the economy.

Mr. MAGUIRE. This gets to the crux of it. We have had a policy which you and the President have enunciated which is hostile to the kind of boycotts that are under discussion here. Now, if that is the case, what is the difficulty that you see in relation to the national interest of having not only Congress but also the public informed as to what is actually going on here? It would seem to me that this information would be valuable to the public.

I can cite a similar case in some respects with the Federal Reserve Board. Mr. Burns told the Congress and the public that he was not prepared to release information on the interest rates charged across the Nation on consumer loans. That was on the basis that it had been given confidentiality and he might have difficulty getting similar information in the future if this was disclosed. Well, eventually it was disclosed because it was in the public interest that this information should be available.

Now, why isn't it in the public interest that information about the boycotting of American firms and discrimination against American nationals should be part of the public's knowledge? If you say it would be harmful to a given business, how do you weigh that against the national interest in terms of having accurate information about what the situation is and allowing citizens to take whatever action they feel is warranted in light of the facts as they know them?

Secretary MORTON. Well, I think you are giving me power above the law when you say that I should do that to firms that are doing business with the Arabs and are doing so legally. I think what you are trying to do here is to give me an inordinate amount of power to the Secretary of Commerce over who does business with whom in the whole world of commerce and I think we have got to be awfully careful here. This is a tremendous issue.

Mr. MAGUIRE. And it is a moral issue, isn't it, Mr. Secretary?

Secretary MORTON. We are not dealing with boycotts, we are dealing with disclosure of information that the law says is confidential. Now, that is one issue over here.

Mr. MAGUIRE. What are we to make of the fact that you circularized Arab offers to 30,000 or so firms in this country and you have sent exactly five violation cases to the Justice Department? The B'nai B'rith has done its own study indicating that there are something like 10,000 individual transactions that are suspect. What are we to believe here? We have a moral position which we state for the record and then we have only five cases turned over to the Justice Department. You are indicating it is not in the national interest to have the public aware of what may or may not have been done.

Secretary MORTON. We are perfectly willing to make the public aware. We can tell you the number of cases. We will tell you the general types that they fall into. We will give you all of the information that we can. If we give you too much detail, the name bleeds through and then we have disclosed it. But we will furnish you all of the base line data that you need to judge the scope and the size and the type of reports that we are receiving. We absolutely don't want to keep that from anybody. If you want that, we are going to give it to you, but we are not going to disclose the names because we said here that the names are going to be held in confidence under section 7(c). That is the basis on which we got it and I am not going to be the one to change the rules in the middle of the game.

Mr. MAGUIRE. Mr. Secretary, let me put in one very brief question. If there are firms who are acting contrary to the enunciated policy of the U.S. Government, what is wrong with the public knowing the identity of those firms?

Secretary MORTON. Well, I think that there could be irreparable harm not only to the general industry in which those firms are operating or participating, but to firms themselves. We have no way of knowing up to now as to whether a company is participating or not, since the question is optional.

Mr. MAGUIRE. It is more important in your judgment to protect the identity of firms which may be in violation of our policy because of what it might do to their business than to enforce that policy and to make it clear to the public exactly what is going on here?

Secretary MORTON. No, and you are not going to trap me on that. That is not true. Under the present reporting system we do not know from the report whether a company is participating in a boycott or not.

Mr. MAGUIRE. I thought the question was included in the form.

Secretary MORTON. It is, but it is optional and in the majority of the cases I don't think it is answered.

Mr. MAGUIRE. That is very interesting. In a majority of the cases it is not answered. Eighty to ninety percent of the time?

Secretary MORTON. No, I don't think it is that big. We can furnish you that information.

Mr. MAGUIRE. It is somewhere between 50 percent and 100 percent?

Secretary MORTON. It must be if it is in the majority.

Mr. MOSS. The Secretary has indicated he would be prepared to supply that for the record.

Mr. MAGUIRE. I did not hear the chairman. Excuse me.

Mr. MOSS. Are you requesting the information?

Mr. MAGUIRE. I would like to request the information.

Mr. MOSS. The Secretary has indicated he will supply the material. Without objection, the record will be held at this point.

[The following information was received for the record:]

In the Second Quarter, 1975, U.S. exporters reported 2,112 transactions in which their cooperation in restrictive trade practices was requested or required by the Arab States. Exporters indicated compliance with the Arab requests in 764 (36.2 percent) of the cases, undecided in 41 (1.9 percent) cases, and no reply in 1,277 (60.5 percent) of the cases.

Secretary MORTON. To make sure what I am supplying, the percentage of cases that do not answer the optional question?

Mr. MAGUIRE. I would like to know which firms have not answered the optional question.

Secretary MORTON. No, I can't do that.

Mr. MOSS. That is what it is all about.

Mr. MAGUIRE. I know, Mr. Chairman.

Mr. MOSS. The time of the gentleman has expired.

Mr. Secretary, just briefly looking at the Attorney General's opinion the legislative history cited is printed in the Congressional Record on the 23d of June in the Senate back in 1962. I find no instance where proposals to amend this act have been made since the enactment in 1966 of the Freedom of Information Act and I also recognize that legislative history is not made by the mere withdrawal of an amendment particularly when it is made on representations to the Senate such as this:

"As a matter of fact, [this committee] furnished to the House committee the names of export license applicants and detail about the license application on every case requested by the House committee."

A little further on: "nor [did] the subcommittee raise any objection against our request not to publicize export license information which we obtained in confidence and which we freely made available to the subcommittee on the same basis for its investigative purposes."

That was dealing with a "request" and we are dealing with something else. There is a degree of difference between them.

Nevertheless, I have certain duties which I must now perform in connection with this committee. Again you have fully studied the development rules of the House and are familiar with the contents of this subpena duces tecum and you here and now refuse to comply and supply the information requested or demanded in that subpona; is that correct?

Secretary MORTON. That is correct.

Mr. MOSS. Then, of course it is my duty to advise you that the subcommittee will take this matter up for consideration. We have several courses open to us. One, that of contempt. Contempt may be tried either in the courts or it may be tried in the House. We are not confined to the judicial route. It is time consuming in either event.

Therefore, the second is to continue to use the powers of the committee and inquire from the individual businesses which will be a costly and highly duplicative cost of the taxpayers' funds, but one made necessary by the determined refusal, the contemptuous—in the judgment of the Chair—behavior of the Secretary in this instance.

And, of course, third we can follow the example which is being set by another committee of this House. We have considerable material on this subject matter of just continuing to reveal it here until it becomes uncomfortable.

I have done all three things during my service in the Congress. It is clear that by any text the refusal does constitute an act of contempt for this body. There is no clear law here that the Attorney General has construed. The Attorney General is reading in far more than the legislative history will support.

The subcommittee will now stand adjourned at the call of the Chair for the purpose of considering further the matter of Secretary Morton and the subpena duces tecum.

The Chair asks unanimous consent that the record be held at this point for the inclusion of certain correspondence which I will direct to you, Mr. Secretary, under the auspices of the subpena and ask for additional answers. At this time——

Mr. RINALDO. Mr. Chairman, before we adjourn, may I ask one question?

Mr. MOSS. Let the Chair finish.

The Chair when we do adjourn does not at that point excuse the Secretary from continuing your obligation under the subpena.

The Chair recognizes for a question the gentleman from New Jersey, Mr. Rinaldo.

Mr. RINALDO. If I understand the matter correctly, the Secretary has already offered to give us all of the material with the names of the firms deleted; is that correct?

Secretary MORTON. Well, I would have to delete certain details of the individual transactions as well as the obvious disclosures of the names, but basically the number of reports, the types of questions asked, all of the information of the general baseline data will be made available, if the committee wants it.

Mr. RINALDO. All right.

Chairman, we don't need every name——

Mr. MOSS. Mr. Rinaldo——

Mr. RINALDO. Let me just finish this question. What I was going to suggest was if the Secretary furnished all of that and then we wanted specific——

Mr. MOSS. The Chair would not receive that material from the Secretary. The Chair is damned if he is going to sit in a Congress that is spoon fed by the Executive that gives it only what it wants it to know and conceals the rest. And I am not about to have the Executive rewrite the rules of the House of Representatives or the Constitution of the United States.

We are invested solely with the legislative power, and it is our judgment, and not theirs.

Mr. RINALDO. You have answered the question, Mr. Chairman.

Mr. MOSS. You have to have pride in your constituency. The Secretary has a constituency of one, the President of the United States and no one else.

The subcommittee will now stand adjourned.

[Whereupon, at 12:44 p.m., the subcommittee adjourned, subject to the call of the Chair.]

CONTEMPT PROCEEDINGS AGAINST SECRETARY OF COMMERCE, ROGERS C. B. MORTON

TUESDAY, OCTOBER 21, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John E. Moss (chairman) presiding.

Mr. MOSS. The subcommittee will be in order.

Although the subject of this subcommittee's inquiry was originally intended to be the effect of the Arab boycott on American commerce, an additional issue has been raised—the refusal by the Secretary of Commerce, Rogers C. B. Morton, to comply with a subpena issued by this subcommittee.

Today and tomorrow, we will hear testimony on this refusal from experts in the field of constitutional law with experience in the area of executive privilege and congressional access to information.

While I am pleased that we have taken constructive steps toward peace in the Middle East, this matter of the Arab boycott remains unfinished business.

In addition, the refusal by the Secretary of Commerce, Rogers C. B. Morton, to comply with a subpena issued by this subcommittee is of immense importance to the Congress and to our system of Government.

The need for this information has in no way been diminished by the completion of the first steps toward peace in the Middle East. The subcommittee's subpena is for information collected by the Secretary of Commerce pursuant to the Export Administration Act. That information is needed by the subcommittee in order to fully assess the impact of the Arab boycott practices on domestic commerce, to determine what laws, if any, have been violated and, accordingly, what legislation, if any, is needed.

The Sinai agreement provides no guarantee that the boycott will end and that American firms will no longer be requested to support that boycott against Israel. The Arab boycott has been in existence for about 20 years, but it has recently intensified as a result of increased wealth of petro-dollars in large part gained from American consumers.

My colleague, and also a member of the subcommittee, Representative James H. Scheuer, of New York, has obtained a list of approxi-

mately 2,000 American firms that are subject to the boycott. This list was approved December 6, 1974, in Beirut, Lebanon, and has been published in the Congressional Record.

I would point out, of course, that this list is not a list of persons and firms who have filed reports with the Secretary of Commerce pursuant to the Export Administration Act; nor does it reflect firms which have complied with the terms of the boycott.

The list includes such firms as CBS, NBC, United Artists, and Otto Preminger Films; also such products as Coca Cola, Connecticut Mutual Insurance, Hartz Mountain pet foods and books published by Knopf, and Random House.

These American firms are not able to do business in Arab countries, not because they have taken sides necessarily with regard to the Arab-Israeli conflict, but, in fact, because they refuse to take sides, or, in some instances, apparently because they are managed by persons of the Jewish faith.

By terms of the boycott, American firms are being asked, in order to do business with Arab nations, not to do business with Israel or with other firms who do business with Israel or have persons of the Jewish faith as members of their boards of directors or with controlling stock.

These practices are contrary to the American concepts of free trade and freedom from religious discrimination. They are also expressly violative of the policy expressed in the Export Administration Act and may well be contrary to Federal Laws regarding restraint of trade and the securities market.

In particular, it is important for the subcommittee to know to what extent such practices may impact on publicly held corporations subject to the securities laws which are within the subcommittee's jurisdictions.

Secretary Morton has refused to comply with the subpena on the grounds that to do so would violate section 7(c) of the Export Administration Act. Section 7(c) provides:

> No department, agency, or official exercising any function under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the persons furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

The Chair would note that the section does not refer to the Congress nor the congressional oversight power rooted in article I of the Constitution.

Our first witness is Prof. Raoul Berger of the Harvard Law School, who is appearing as a consultant to the subcommittee on this matter.

At this time, I would like to ask Professor Berger to step forward and be sworn.

Do you solemnly swear that the testimony you are about to give this committee shall be the truth, the whole truth, and nothing but the truth so help you God?

Mr. BERGER. I do.

Mr. MOSS. Will you identify yourself for the record?

TESTIMONY OF RAOUL BERGER, CHARLES WARREN SENIOR FELLOW IN AMERICAN LEGAL HISTORY, HARVARD LAW SCHOOL

Mr. BERGER. My name is Raoul Berger.

I am a resident of Massachusetts, residing at 140 Jennie Dugan Road in Concord, Mass.

I am presently the Charles Warren Senior, fellow in American legal history at Harvard Law School.

Being long past the age of 67, I am supposed to be out to pasture.

Is there anything further that you would like me to say?

Mr. MOSS. No.

I would like now very much to hear you discuss the legal issues that will confront this subcommittee in finally determining the disposition of the case involving Secretary Morton.

Mr. BERGER. I may say, first, that, as burning as is the whole boycott Israeli problem, the specific problem that is posed to you here by the refusal of the Secretary of Commerce to comply with the subpena overarches even that issue; it goes to the core of the whole relation between the Congress and the President.

The Congress—I have been a long-time adherent to, and battler for congressional equality—the Congress, itself, has been derelict.

I am going to be blunt. Had the Congress in a righteous cause exhibited a tenth of the solicitude for its own institutional rights that Mr. Nixon exhibited with respect to an unworthy cause for the Presidency, you wouldn't have the problems that you have. They are self-created.

I would beg you gentlemen, whether you are Democrats or Republicans, to think of the Congress as an institution which you are dedicated to preserve.

I speak to you first as a lawyer, second as a citizen, and at no time as a partisan. I have tried to call my shots, as I have all my life, right down the line.

And I should add one other thing.

My interest in this problem goes back a long, long time. I published on it first at Yale in 1954 and I wrote a seminal work during the Kennedy administration and the Johnson administration, criticizing resort to executive privilege. So, for me, it is not a Democratic disease or Republican disease; it is an occupational disease.

Now, don't be consternated by what looks like a long memorandum. With footnotes, it will be only 12 or 13 pages.

I am going to follow a practice I was adjured to follow by Justice Frankfurter. He said never forego the opportunity of oral argument. I follow him the more because I know if I don't catch your ear now, many of you will never read my memorandum [see p. —].

So, I want to lead you through it because in a brief compass I try to brush in the solid footing on which Congress stands because you, like the rest of us, have been victimized by propaganda and by the constant assault on our ears of swollen unjustifiable executive claims, so that you can't help wondering, maybe after all there is such an animal as "executive privilege."

In my judgment, there "ain't." I don't have to read the statute. It has been read to you by the chairman.

What the argument really amounts to is that Congress surrendered a crucial power by silence. That is a very difficult argument to maintain in any case; and you want to view it with a jaundiced eye because it alleges a self-curtailment of a power that goes back centuries.

The argument of the Attorney General in brief is, one, there is a presumption that the statutory restriction upon disclosure of confidential materials bars congressional access. There is no mention of Congress but there is a presumption, we are told, against disclosure to it.

Two, the legislative history of the Export Act shows a purpose to create such a bar.

Three, administrative construction to that effect has been embedded in the statute by what is known as the reenactment rule.

Those propositions, in my judgment, are without support. They can't be sustained in law or in fact.

A preliminary word. The customary weight attached to an opinion of the Attorney General is considerably diminished when it pertains to a dispute between the executive branch and the Congress, for the loyalty of the Attorney General then runs to the President. He is an advocate with a client.

One of the most distinguished Attorneys General, Justice Robert H. Jackson, declared, when one of his own prior statements was pressed upon him, that a "judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."

He thrust aside on the bench, as self-serving advocacy a statement that he, himself, had made. He later did that with respect to a formal opinion. In fact, in an utterly charming statement, he said, "I have a hunch that probably I never read it." Only somebody who knows the vast bureaucracy of the Department of Justice can appreciate that. Jackson signed a great many things.

Advocacy can also color more formal opinions, as is exemplified by the elaborate memorandum opinion submitted to a Senate committee by Deputy Attorney General William H. Rogers that claimed for the President uncontrolled discretion to withhold information from Congress and the courts. Former Solicitor General Archibald Cox said it has been subject to devastating criticism. That was an opinion delivered to the Congress on a historic controversy. It is full of holes, more than Swiss cheese.

Without disrespect to the Attorney General, therefore, his opinion must stand on his reasoning alone. That is all I am going to claim before you for my own opinion. Whatever virtue attaches to my opinion must be on the strength of the reasoning and the cited authorities. I will gladly learn from you if I am mistaken.

I shall yield to questioning happily and shall try to answer as best I can, and if you prove to me that I am wrong I shall acknowledge it here and now and I hope you will do the same if I prove to you that you are wrong.

Let us begin with the presumption. The Attorney General looks at a statute that is silent as to Congress and says, there is a presumption that it constitutes a bar to the demand for information by Congress. He

says, "Statutory restrictions upon executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees."

In a cognate situation, the courts have held that statutes restricting access to confidential information do not bar courts for purposes of administering justice. For example, the Court of Appeals for the District of Columbia held that "The statutes imposing secrecy upon the Commissioner of Internal Revenue are not intended to impede the wheels of justice." There are a number of State cases to the same effect, which have held that such statutes are intended only to prevent voluntary disclosure to the public, not disclosure in response to judicial demand.

The case of Congress, which delegated the function and instructed the Department to withhold the information stands even higher; it is a strained inference that Congress meant to curtail its own established right of oversight by its authorization to withhold information from the public. The English rule is that "statutes do not bind the Crown in the absence of express provision or necessary implication." In a word, in England, if a statute is to bind the Crown, it must mention the Crown; otherwise the presumption is that it is not binding on the Crown. It is precisely the contrary that the Attorney General seeks to wrest from the silence of this statute.

But, more important, this presumption has grave constitutional implications and, notwithstanding the Attorney General's disclaimer that there are constitutional problems, he is relying on an opinion of Attorney General Brownell which rests on a constitutional presumption. Attorney General Herbert Brownell stated as "a fundamental practice and precedent of our government: that there is discretion in the executive branch to withhold confidential papers," from Congress and the courts. It is that pernicious doctrine which was spread before the Senate by Deputy Attorney General Rogers. In brief, it amounts to this: Because over the years a number of Presidents have claimed they have a constitutional right to withhold information from Congress, ergo, that is constitutional doctrine, it gives rise to a presumption of a right to withhold.

That this discretion is in fact not "uncontrolled" was a lesson President Nixon learned in *United States* v. *Nixon*. Although Chief Justice Burger found that there was a privilege for confidential discussions between the President and his aides, he held that it had to yield to the needs of a court in the administration of justice.

I may remind you that there were those who thought that it would utterly destroy the Presidency to compel Mr. Nixon to make the disclosure. The court required disclosure. The Presidency has kept rolling along just like Old Man River. The only one who was destroyed was an unworthy incumbent.

By the same token, by the reasoning of Chief Justice Burger, the needs of Congress, a coordinate branch, for information in order to perform its own functions similarly overrides the claim of privilege.

So, I would say notwithstanding this recognition of an executive privilege, it is like marching your soldiers up the hill and marching them down again. For Chief Justice Burger tore a breach in that privilege because he says we need this information if we are going to administer justice.

By parity of reasoning, you can say we need this information f a vastly more important reason than doing justice in an individu case—in order to serve the public interest of 200 million citizens.

In evaluating the presumption, it needs to be borne in mind that would apply to many similar statutory provisions. I am told there a almost 100 of them which provide similar confidential treatment. Co sequently, you would really erect an iron curtain around all of the statutes if you uphold the Attorney General's view in this case.

Now, the function of oversight has a long parliamentary histo This I researched in detail. It was exercised without executive dem in that long history. Over a 150-year period there never was an e ample of executive recalcitrance; inquiry was accepted. My findin were confirmed by a great English historian, Henry Hallam.

So, you have a long history of untrameled legislative inquiry wit out executive demur. Executive withholding is a product of our tim The English practice was adopted by the Founders and has been e pressed in your oversight statute which even Attorney Gene Brownell recognized as law.

The importance of the oversight function was underscored by Woo row Wilson:

> Quite as important as legislation is vigilant oversight of administration: a even more important than legislation is the instruction and guidance in politi affairs which the people might receive from a body which kept all national c cerns suffused in a broad daylight of discussion . . . The informing function Congress should be preferred even to its legislative function.

I give you a graphic example: Had the Congress been alert inquire into, to debate what was involved in, Johnson's stealthy esca tion in Vietnam, conceivably you would have aroused public opini much earlier and we would have put an end to this ghastly, utte useless conflict.

Article II, section 3 of the Constitution imposes upon the Preside the duty to take care that the laws be faithfully executed. The mal of the "laws," stated Montesquieu, the apostle of the separation powers, has a right to examine "how its laws have been executed." fact, it would be astounding that you could make a law and yet be quired to shut your eyes to execution of the law without the right inquire, "What are you doing with what I have given you?" Mont quieu expressed one of the earliest rubrics of parliamentary inqui inquiry into the "execution of the laws." It was exercised by Congr from the beginning. There are so many cases one cannot even pause enumerate them.

From the very outset, the Congress said we have a right to exam into every branch of governmental activity, and it did so. It did so the midst of the Civil War with the great Covode investigation. H is the war being conducted?, they asked. What is happening he And its legitimacy was sealed by the Supreme Court in the wake of Teapot Dome investigations when it held that Congress had jurisc tion to inquire into the administration of the Department of Just and particularly whether the Attorney General and his assistants w performing or neglecting their duties.

Now I ought to stop for a moment. There is a mistaken notion t investigation is merely an adjunct of legislation. It is not so. Fi

the very beginning, there was in independent investigatory function known as the Grand Inquest of the Nation. Today we identify that with impeachment, the Congress sitting as an impeachment tribunal. That is not so. The Grand Inquest described the overall investigatory function of the House of Commons; and it was adopted by the Founders. There are a number of references to the House as the Grand Inquest of the Nation. It was known to the Founders that the House was going to employ this investigatory function.

I remind you there is a statement in the Constitutional Convention by one of the greats, George Mason of Virginia. It is in a footnote on page 6. He said "Congressmen are not only legislators but they possess inquisitorial powers. They must meet frequently to inspect the conduct of the public offices."

So, your "oversight" function has an independent source. The people have always looked to a parilamentary body for oversight of how the executive is conducting its public business.

There are so many of these examples I only regret I haven't the time now to enumerate them. Even the great diarist, Samuel Pepys, who was a high officer in the Navy, said, "God help us, only the Parliament can." He was hoping Parliament would meet and look into the conduct of the executive departments which he thought were hell-bent for leather.

As I say, the Supreme Court held that Congress had jurisdiction to inquire in the administration of the Department of Justice and particularly whether the Attorney General and his assistants were performing or neglecting their duties. Whether he has faithfully executed the laws obviously cannot be left in the President's own discretion, as Watergate alone should teach. Nor can it be left to him or to his subordinates to determine how much and what information Congress needs, for inquiry would be hobbled at the threshold as was again illustrated by President Nixon.

Let me remind you of something that you, yourself, have been prone to forget, of what Madison, the Chief Architect of the Constitution, stated in the Federalist: "In a republican government the legislature naturally predominates." What he meant was that in a republican government the Congress was the senior partner; you merely have to look at the distribution of powers on the face of the Constitution, and compare the tremendous armamentarium of powers granted to Congress and the few skimpy powers granted the President, even going so far as to give him a picayune power of asking for opinions from his Secretaries. He had to be given express permission for that.

This gives you an idea of the different roles that were occupied by the Congress and the President in the minds of the Founders.

I must say to you, it is you, the Congress, that have permitted the President to upset the apple cart; and it is one of the hopeful things that in the wake of Vietnam and Watergate you are seeking to restore that constitutional equilibrium.

I regard what you are seeking to do here as part of that process. That is more important than any party at any given time.

Mr. SCHEUER. Do you feel that ideally there should be an equilibrium or should it be the predominance which Madison discussed?

Should we try to get back a quantum of power that would give us a more than equal role?

Mr. BERGER. I would answer by saying get back to what the Constitution gave you.

Mr. SCHEUER You are saying that Madison said that we had more than an equal role?

Mr. BERGER. That is right. I think that is what is illustrated by the face of the Constitution. Let me give you a quick example. Consider the warmaking power; the President's war powers are described in three words, Commander in Chief, which Hamilton said means merely being the first general and the first admiral. We know the first general just conducts a war after you have declared it. All of the war powers, and there are perhaps 10 or 12 of them carefully enumerated, are in the Congress. Yet, the Congress supinely stood by and let the President exercise the war powers.

I don't think we need to revise the Constitution. I am satisfied to restore the Constitutional equilibrium, to assert the powers which were granted to you.

Should you, by the way, say to me: What is this about the power of investigation: where do you find this in the Constitution? Down the line I will be happy to respond. I am armed to the teeth on that.

For present purposes suffice it to assume that you are not a senior partner. Let us say you are an equal partner. Certainly, that much one has to grant. You are a partner in the Government. What partner would be permitted to insist that the partnership business cannot be conducted unless he is free to conceal business details from his partner? Think of it, Sam says, "Well, Jake, really we can't conduct this partnership if I have to tell you everything." That way lies corruption, inefficiency and waste, the very things the Supreme Court stated lie within Congressional inquiry.

To pursue common sense further—and bear in mind what Judge Goodrich says in the footnote, "If a legal proposition does not stand up under common sense you had better rethink the whole thing." What partner would claim that his partner's authorization not to publish certain business information constituted a surrender by his partner of access thereto? That is the principle for which the Attorney General is giving you an opinion.

The presumption, I submit, runs counter to common sense. Something that is often overlooked needs to be emphasized also; there is no express constitutional authority for Presidential withholding of information even from the public. In sharp contrast, Congress was given explicit authority by article I, section 5, to keep parts of its journal secret. Let me dwell on that. The only authority in the Constitution to keep anything secret from the public is lodged in Congress. Ultimately, when classified information is given to you it is Congress that was given the power to say whether it should or should not be kept secret, not the President.

One other thing I want to hammer home here.

You are not dealing with the type of case that we had with respect to the Nixon tapes; this is not a claim by the President that "Unless I can talk confidentially to my aides, I can't carry out my Presidential duties."

In a word, this is not a question of confidentiality that allegedly goes to the very roots of carrying out an executive function. This is an executive claim of right to protect the American people against Con-

gress, because the corporations that file information are part of the American public. The President garbs himself in holy vestments and says, "I am your protector." Who made him the Protector of the American people against Congress?

If anybody is going to protect the people, it is Congress against the President. You just have to look at the impeachment power to see where the power was lodged to protect the people.

What is involved here is really the right of privacy. For the right of privacy the courts say, "We are the protectors." They protect the people against Congress, too, and individuals often need protection against Congress; but it is the courts that afford that protection. Except for the veto power, the President was given no power to correct Congress vis-a-vis the people. The power to correct excesses was lodged in the Congress, not in the President.

There is nothing comparable to the oversight power on the Presidential side in the long history of the English-speaking peoples. It has always been assumed, as Justice Brandeis reminded us, the people have always assumed that they "must look to representative assemblies for the protection of their liberties." They don't look for the President to protect them, or the King against the Parliament. They looked to the Parliament to protect them against the King, the Congress to protect them against the President. That is what the starting point is.

So, I would wind up there is no presumption in favor of withholding confidential information from Congress. In fact, the fundamental principles of our Constitution give rise to a presumption that runs the other way.

I think the overarching question, the Constitutional power, is very important.

There have been two opinions on which I will be happy to express myself, *United States* v. *Nixon*, the Burger opinion saying that although there is privilege for confidential conservations with aides, it must yield to me fair administration of justice, and that hole has already been extended to civil cases.

Then there is the Ervin select committee case where they did not enforce the subpena. Perhaps you may want me to express my views on both of those cases because I have published articles on both of them.

Let us turn to the statutory argument.

Because a few statutes have made explicit exceptions from confidential treatment for congressional requests, the Attorney General argues that when there is no such exception it is presumably not intended. The cited exceptions relate to information obtained by the Civil Aeronautics Board and by the Department of Agriculture respecting commodity markets.

There are at least 100 such statutes which range across the entire spectrum of governmental activity. The Attorney General would erect a wall around all such information. First, as a practical matter, under his interpretation, special sanctity would attach to confidential information furnished the Securities and Exchange Commission but would be denied to the Civil Aeronautics Board when the fact is that every branch of business he attaches equal value to "commercial and financial" secrets. It does not make any sense.

This is not the situation for doctrinaire application of the maxim expressio unius, exclusio alterius. Congress, itself, has known how to limit informtaion to itself, for example, it has provided that certain international agreements shall be transmitted only to two named committees. There is another provision like that in the Internal Revenue Code. One might equally argue from these two cases that in the absence of such limitations Congress, itself, may call for information. But I would say with respect to the Attorney General's citations it is really a very far-fetched inference that when a couple of alert Congressmen in particular committees are looking at a little segment of governmental activity, say, "Wait, we ought to safeguard this," that you should impute to the Congress an intention in all the rest of the statutes, at least 100 cases, that you surrendered a part of your "oversight" power.

There is actually expressed Congressional policy that the thought of such surrender was never in the minds of the Congress. I will come to that. What you have here is an argument that by silence of the statute there has been surrender of the oversight power, pro tanto, unless the Secretary finds it is "in the national interest" for you to see it.

That is an extraordinary idea, that the ultimate arbiter of what is in the national interest should be your agent, you have given him a function, and now he says in effect, "I don't think it is in the national interest for you to see this." That is the negative pregnant of the argument. I don't think the Congress can afford to let an agency tell it that. You are the arbiter of what the national interest is, not the person to whom you have delegated the function.

Then too, Congress cannot abdicate its own constitutional power. You have the power of oversight. You can't abdicate it in toto or pro tanto. You can delegate it but delegation is not abdication. Delegation is not surrender. A principal always reserves the power when he employs an attorney or accountant or anybody else to ask, "How are you doing the job?"

You don't blindfold yourself when you give a power of attorney to somebody.

I would say a construction which amounts to an abdication of power raises a constitutional doubt which under the cases should be avoided. The courts will try to read a statute to avoid a constitutional doubt. Under the Attorney General's view, you raise a constitutional problem. This alone should counsel against the construction that Congress has walled itself off from complete exercise of its oversight function, from asking the delegate, "How are you performing the delegated task?"

I have tried to restrain myself from pejorative language in writing the opinion and I hope to maintain that stoical attitude but the Attorney General's legislative history argument is, to say the least, remarkable. I will try to capsulate it briefly. In 1956, the Senate considered but did not adopt an amendment which would have required the agency to comply with any demand of a congressional committee, considered it but did not adopt it. But Chairman Fulbright stated:

"The committee, of course, wanted to make it clear that the omission of the amendment from the bill, as reported, was not intended as any

indication whatever of the committee's view on the subject of the amendment."

He said: "We simply feel it should be studied by the House Judiciary Committee. We think it is a better place to explore the problems." Yet, in the face of the committee chairman's statement that "We don't intend to pass judgment in any way on it", the Attorney General would wrest a presumption that there has been a surrender because they didn't adopt the amendment. That is item 1.

Item 2: Kitchin, a sadly-confused man—well, to show you that he starts off by saying: "The present Administrator of the act probably interprets the predecessor of section 7(c) as precluding him from furnishing such information to the Congress." Six or seven lines down he says: "The Secretary of Commerce has stated that nothing in the present statute would prohibit the Department from furnishing such information." He could not make up his mind. When a man is sloppy and careless like that, right off the bat his credibility is impaired. He goes on to say, "It is within the discretion of the Secretary of Commerce to give it or not."

To begin with, the Secretary's acknowledgment that the statute does not prohibit disclosure controverts the argument that section 7(c) constitutes a statutory bar to disclosure.

Kitchin's remark that the Secretary has "discretion" to withhold from Congress only represents one member's construction of a prior act which is not conclusive. The Court looks very unsympathetically even on subsequent interpretations by Congress itself because the theory is, "If you don't like the statute, repeal it or amend it. We are not going to look at your later expressions about it." Then, too, Kitchin's view of discretion runs counter to the published views of many committees before and since which I won't burden you with by detailing, but I shall only mention one of them, a response to President Tyler. They repudiated vehemently the notion that there was any discretion in the President to withhold information. So, what Kitchin says is just one man's view.

As I shall show later, when Congress itself, came to render its considered judgment, it took exactly the opposite position.

We can dismiss Keating's legislative history on the very same basis because, first of all, as is shown in the lower third of page 14 he had agreed that he was willing to withdraw the amendment to give an opportunity for hearings to be held on a collateral matter. How do you wrest an implication that Congress intends to surrender a power from that?

When he says there is a presumption against disclosure, again that is one man's view which the Congress, itself later on by implication repudiated.

I may say that I am not without sympathy for off-the-cuff remarks. There are very many able lawyers in this Congress; I know some of them. I admire them. But they are all busy men. I sometimes marvel how they carry the burden they do. You are harassed, have thousands of bills to follow and read. It is not to be wondered that you haven't had the opportunity to study this, that, or the other problem in depth, and that you often deliver yourselves of unwise remarks which later on are seized on by the executive department to haunt you. But they

should not bind the Congress. It is only when the Congress brings its own mature judgment to bear and focuses on a problem that you have something that carries weight.

So I would say, to put it mildly, the legislative history at best is inconclusive; and given the established power of legislative oversight it should require clear evidence of an intention to curtail it. Let me cite to you an opinion by Chief Justice Burger in *Pierson* v. *Ray*. There he was faced by a statute that said if "any person" under color of right should deprive another of civil rights, speaking roughly, certain consequences will follow. He said Congress couldn't have meant that because the immunity of judges, the common law immunity of judges for what they do under color of their office, is established. He said, "I want clear evidence they meant to include judges." And by the same reasoning I want clear evidence that the Congress meant to exclude itself.

As far as the administrative construction argument goes, that is at least innovative; the idea that an agency may employ its own construction of a congressional delegation in order to bar Congress from inquiring how the delegation is being executed. It is as if an agent were to claim finality for his construction of the power entrusted to him by his principal. The agent is telling the principal, "I know what you meant when you drew up my power of attorney, and you can't be heard to controvert it." That is what the administrative construction doctrine means in this case. It is unheard of.

The Supreme Court said in an analogous reenactment case, "The point is immaterial for Congress could not add to, or expand, this statute by impliedly approving a regulation." By the same token, the administrator can't add to or diminish the statute by his administrative construction. That would be sheer bootstrapping.

As regards the "reenactment" argument, the claim is that Congress sealed the administrative construction into the statute.

There are numerous arguments against that. I will content myself with one, "A plainly erroneous construction does not become correct by any subsequent reenactement." Also, the reenactment rule, itself, is not in good repute. It was criticized by the Supreme Court "as an unreliable indicium at best." Former Solicitor General Erwin Griswald said it should carry no weight at all. There is a thundering refutation here to which I found no attention paid by the Attorney General. That is repeal by implication. I am going to try to boil that down. After the enactment of the export statute the Congress adopted the Freedom of Information Act. There it provided, among other things, an exemption where statutes prohibit disclosure. Then it went on to say, but "nothing in this section shall be authority to withhold information from Congress." To make matters clear, the House report states that this restates the fact that a law controlling public access to Government information has absolutely no effect upon congressional access to information.

There at one fell swoop you have the demise of Kitchin, Keating, et al. The Freedom of Information Act is restating that a law that controls public access to governmental information has absolutely no effect upon congressional access to information.

That provision was reenacted when the Freedom of Information Act was codified. So, minimally you have had a construction by Con-

gress, a declaration of policy. That policy was that confidential treatment provisions have absolutely no effect upon congressional access to information. The Supreme Court said in an analogous situation. "Congress, when the matter has come to its attention, has expressly recognized," in terms of our case, that such statutory bars are inapplicable to Congress, and "the same intent should be implied as to" section 7(c). When Congress had the matter before it in the Freedom of Information Act, it said prohibitions of disclosure don't apply to Congress. Even if the Export Act had not been included, as it was in this particular aspect under the sweep of that Federal Freedom of Information Act, that policy would obtain.

We have something more conclusive. Under the interpretation by the Attorney General he reads into the silent statute a prohibition, a bar to disclosure. But the Freedom of Information Act says that statutory bars to disclosure don't apply to Congress. There is an inconsistency or repugnancy in the law. The law is that when two acts "are repugnant in any of their provisions, the later act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." So, to the extent that the statute must be read as the Attorney General says, and I submit to you it can't be read in that fashion, it has been repealed.

Let me add a last word. To my way of thinking this is one of the most far-fetched appeals to secrecy. It is well known that this is a bureaucratic occupational disease. Professor Wade of Oxford has said so in England. Political scientist Max Weber referred to the same bureaucratic ailment in Germany.

I may say I spent 8 years in the Government and wound up as a general counsel, but I have washed that out of my hair since.

When you are in the bureaucracy you become an expert; you think that you know more than the other fellow, even more than a Congressman. I know that will surprise you, but that is so. The expert begins to think like Big Brother. The expert knows what is best. If he tells you all he knows, first of all, it may disturb you. Second, you will know as much as he does. It is really an occupational disease, as Professor Wade of Oxford called it. The sad thing is no sooner does a man get in office then the bureaucracy gets hold of him. He begins to feel there is a sanctity attached to information.

I will recall one of the dazzling examples of bureaucratic effrontery; Melvin Laird's bout with the Senate Foreign Relations Committee when they asked for the Pentagon Papers—you remember the Pentagon Papers gave a cold insider's view of the fatuous, futile policy in Vietnam. Here is Congress who had to keep on appropriating billions, and asked, "Let us see what some of the vices were, as you insiders disclosed them, so that we can deal with them."

Laird replied, "We don't think it is in the national interest for you to see that."

You have nobody to blame but yourselves. I would adjure you, whether you are a Republican or Democrat, be as loyal to your institution as Nixon professed to be to the Presidency in an unholy cause. You have a great institution. The American Republic, remember what Brandeis said, puts its trust in representative assemblies. It is not that I think that all the wisdom has been reposed in you. By the same token, I don't think that a journey from Capitol Hill

to Pennsylvania Avenue transforms a former Congressman into a miracle man; and I know some of you will be disappointed to hear that.

The thing I love about Congress is that you don't have any yes men, or have few of them. You have strong minded men who will debate an issue. Because it is debated it gets ventilated. The American people find out about it. That is tremendously important. That is what Woodrow Wilson was talking about.

I would urge you to reassert rights that the Constitution vested in you. Exercise those rights. Don't operate the Government blindfolded in any respect.

I will give you a classic example of that. You, Mr. Chairman, as I recall, many years ago dealt with the Inspector General and Secretary of the Air Force.

Mr. Moss. That is correct.

Mr. BERGER. That was in the Defense Department. This was a branch which cost them $20 million a year, the Inspector General's Office that was supposed to keep tabs on the Air Force. How well their job has been done you can see by the Northrop Lodge being conducted in Maryland for hunting and so forth for the benefit of generals and admirals. So that even James Schlesinger says: "This is not exactly a shining example for us."

Here you have this Inspector General who issued a long report. I think it was your committee too, Mr. Chairman, who asked to see it. The Secretary said: "We will give you a summary of it." It was testified by somebody from the office itself that "you really won't understand it because there is a bookshelf of backup material, a 5-foot shelf. To really understand it you have to read all that." Yet the argument was that: "If we have to tell you about it, we can't do the job as well."

Mr. Moss. I might for accuracy in the record point out that that was a 130-page report. After considerable pressure the Inspector General through the Secretary of the Air Force made 100 pages available to the committee. I then expressed the strong conviction that only the remaining 30 pages interested me at all.

We ultimately, after many weeks of hearings and pressure, got the entire report.

Mr. BERGER. One last remark before I open up for your fire. Theodore Sorensen said there is nothing wrong with executive privilege that a few contempt proceedings won't cure, and he is right. You just have to show that you mean business, that you refuse to be spoon fed with information that they think is all you need to know. That is the way you talk to a little 2-year-old without explanation: "We tell you only what we think is good for you." You can't do business blindfolded.

You have the right to information; and it is a historical right. The history against it is just the post 1789 so-called precedents that Solicitor General Cox said were "devastatingly" criticized. Even Chief Justice Burger had no stomach for those. He sought to root "confidentiality" in the Constitution.

I don't want to get off on that. I am your man.

[Mr. Berger's memorandum-opinion follows:]

MEMORANDUM-OPINION ON THE ATTORNEY GENERAL'S OPINION OF SEPTEMBER 4, 1975, TO THE SECRETARY OF COMMERCE

(By Raoul Berger)

You have asked me to comment upon the Opinion Attorney General Edward H. Levi furnished to the Secretary of Commerce on September 4, 1975, that he need not comply with a subpoena of the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee directing him to produce certain reports filed with the Department pursuant to section 4(b) of the Export Administration Act of 1969,[1] on the ground that the confidentiality requirement of section 7(c) of said Act (hereinafter termed Export Act) overrides the subpoena. Section 7(c) provides: "No department . . . or official exercising any functions under this Act shall publish or disclose information obtained hereinunder which is deemed confidential . . . unless the head of such department . . . determines that the withholding thereof is contrary to national interest."[2]

The argument of the Attorney General is that (1) there is a presumption that the statutory restriction upon disclosure of "confidential" materials bars Congressional access; (2) the legislative history of the Export Act shows a purpose to create such a bar; (3) an administrative construction to that effect has been embedded in the statute by reenactment. These propositions, in my judgment, are insupportable.

The customary weight attached to an Opinion of the Attorney General is considerably diminished when it pertains to a dispute between the Executive branch and Congress. For the loyalty of the Attorney General then runs to the President; he is an advocate with a client. One of the most distinguished Attorneys General, Justice Robert H. Jackson, declared when one of his own prior statements was pressed upon him, that a "judge cannot accept self-serving press statements of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate has himself."[3]

Advocacy can also color a mort formal opinion, as is exemplified by the elaborate memorandum-opinion submitted to a Senate Committee by Deputy Attorney General William P. Rogers that claimed for the President "uncontrolled discretion" to withhold information from Congress and the courts.[4] The memorandum, stated former Solicitor General Archibald Cox, has been subjected to "devastating" criticism.[5] Without disrespect to the Attorney General, therefore, his Opinion must stand on its reasoning alone.

(1) THE PRESUMPTION

The Attorney General states that "statutory restrictions upon executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees."[6] In a cognate situation, the courts have held that statutes restricting access to confidential information do not bar courts for purposes of administering justice. So, the Court of Appeals for the District of Columbia held that "The statutes imposing secrecy upon the Commissioner [of Internal Revenue] are not intended to impede the wheels of justice. . . ."[7] And a number of State courts have held that such statutes are intended only to prevent voluntary disclosure, not disclosure in response to

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[1] 50 U.S.C. App. 2403(b).

[2] 50 U.S.C. App. 2406(c).

[3] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 647 (1952) (concurring opinion). And Justice Jackson did not shrink from repudiating one of his own formal opinions as Attorney General, saying that, "It would be charitable to assume that neither the nominal addressee nor the nominal author [Jackson] of the opinion read it." *McGrath* v. *Kristensen*, 340 U.S. 162, 177 (1950) (concurring opinion).

[4] Reprinted at *Hearings on S. 921 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 75 (1958).

[5] Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1384 n. 2 (1974).

[6] Opinion of the Attorney General to the Secretary of Commerce, Sept. 4, 1975, at 4 [*hereinafter cited as* Opinion].

[7] *Blair* v. *Oesterlein Machine Co.*, 17 F. 2d 663, 665 (D.C. Cir.), *aff'd*, 275 U.S. 220, 227 (1927); *see Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654, 662 (D.C. Cir. 1960).

judicial demand.[8] The case of Congress, which delegated the function and instructed the department to withhold the information, stands even higher; it is a strained inference that Congress meant to curtail its own established right of "oversight" by its authorization to withhold information from the public. The English rule is that "statutes do not bind the Crown in the absence of express provision or necessary implication."[9]

The "presumption" argument has grave constitutional implications, for among the prior Opinions cited by the Attorney General is one by Attorney General Herbert Brownell, Jr., wherein it is stated as "a fundamental practice and precedent of our Government: that there is a discretion in the executive branch to withhold confidential papers."[10] That this "discretion" is not "uncontrolled" was the lesson President Nixon learned in *United States* v. *Nixon*.[11] Although Chief Justice Burger found that there was a privilege for confidential discussions between the President and his aides, he held that it had to yield to the needs of a Court in the administration of justice.[12] By the same token, the needs of Congress, a coordinate branch, for information in order to perform its functions similarly override the claim of privilege.

In evaluating the "presumption," it needs to be borne in mind that it would apply to many similar statutory provisions[13] and therefore threatens a serious curtailment of the Congressional "oversight" function. That function has a long parliamentary history, exercised without executive demur;[14] it was adopted by the Founders,[15] and has been expressed in a statute,[16] which even Attorney General Brownell recognized as "law."[17] The importance of the "oversight" function was underscored by Woodrow Wilson: "Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body which kept all national concerns suffused in a broad daylight of discussion . . . The informing function of Congress should be preferred even to its legislative function."[18]

Article II, section 3 of the Constitution imposes upon the President the duty to "take care that the Laws be faithfully executed"; the maker of the "laws," stated Montesquieu, the apostle of the separation of powers, has a right to examine "how its laws have been executed."[19] In this he expressed one of the earliest rubrics of parliamentary inquiry, inquiry into the "execution of the laws."[20] It was exercised by Congress from the beginning;[21] and its legitimacy was sealed by the Supreme Court in the wake of the Teapot Dome investigation when it held that Congress had jurisdiction to inquire into "the administration

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[8] *State* v. *Church*, 35 Wash. 2d 170, 175, 211 P.2d 701, 703–04 (1949); *Bell* v. *Bankers Life & Gas Co.*, 327 Ill. App. 321, 330, 64 N.E. 2d 204, 208 (1945); *Maryland Gas Co.* v. *Clintwood Bank, Inc.*, 155 Va. 181, 193–94, 154 S.E. 492, 496–97 (1930).

[9] H. W. R. Wade, Administrative Law 18 (2d ed. 1967).

[10] 41 Op. Att'y Gen. 221, 228 (1955).

[11] 418 U.S. 683 (1974).

[12] *Id.* at 713.

[13] *See* note 32 *infra* and accompanying text.

[14] R. Berger, Executive Privilege: A Constitutional Myth 15–31 (1974) [*hereinafter cited as* Berger].

[15] For a summary, see Berger, *Executive Privilege: A Reply to Professor Sofaer*, 75 Colum. L. Rev. 603, 609–10 (1975).

[16] 2 U.S.C. 190d, originally enacted as section 136 of the Legislative Reorganization Act of 1946. The oversight function has been a matter of constant concern to the Congress, expressed in a series of statutes, the most recent major enactment being the Reorganization Act of 1970. Act of Oct. 26, 1970, Pub. L. No. 91X510, 84 Stat. 1156.

[17] 41 Op. Att'y Gen. 221, 223, 227–28 (1955).

[18] W. Wilson, Congressional Government 297, 303 (1913); *see United States* v. *Rumely*, 345 U.S. 41, 43 (1953), and *Tenney* v. *Brandhove*, 341 U.S. 367, 377 n. 6 (1951), quoting with approval a portion of the cited passage. In this Wilson merely echoed J. S. Mill and Walter Bagehot; for quotations see Berger, *supra* note 14, at 4 n. 18. Moreover, a "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. . . ." *McGrain* v. *Daugherty*, 273 U.S. 135, 175 (1927). There has been a mistaken tendency to regard the investigatory power merely as an adjunct to legislation. *McGrain* v. *Daugherty*, *supra* at 175. But as George Mason stated in the Constitutional Convention, Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public officers." 2 M. Farrand, The Records of the Constitutional Convention of 1787, at 206 (1911). Recognition of this fact is exemplified in *Watkins* v. *United States*, 354 U.S. 178, 187 (1957), by the statement that the investigatory power "comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste."

[19] C. Montesquieu, The Spirit of the Laws 187 (Philadelphia, 1802); *see* authorities cited in Berger, *supra* note 14, at 4 n. 14.

[20] Berger, *supra* note 14, at 20.

[21] *See* authorities cited *id.* at 38, 44.

of the Department of Justice . . . and particularly whether the Attorney General and his assistants were performing or neglecting their duties. . . ."[22] Whether he has "faithfully executed" the laws obviously cannot be left in the President's own discretion, as Watergate alone should teach. Nor can it be left to him or to his subordinates to determine how much and what information Congress needs, for inquiry would then be hobbled at the threshold as was again illustrated by President Nixon.

Congress itself needs to be reminded of what Madison, chief architect of the Constitution, stated in *The Federalist*: "in a republican government the legislature naturally predominates."[23] That is confirmed by the pronounced disproportion on the face of the Constitution between the great arsenal of powers conferred upon Congress and the very few powers given the President—including the picayune power to require written opinion from the several Secretaries. One need not for present purposes insist that Congress is the senior partner; let us assume only that it is an equal partner. What partner would be permitted to insist that the partnership business cannot be conducted unless he is free to conceal business details from his partner? That way lies "corruption, inefficiency and waste," the very things the Supreme Court stated lie within Congressional inquiry.[24] And to pursue common sense further,[25] what partner would claim that his partner's authorization not to publish certain business information constituted a surrender by his partner of access thereto? The presumption, I submit, runs counter to common sense. It needs to be emphasized that there is no express constitutional authority for presidential withholding of information, even from the public.

In sharp contrast, Congress was given explicit authority by article I, section 5, clause 3, to keep parts of its Journals secret. It is therefore reasonable to infer that it is Congress which is to determine whether or not information in government hands is to be kept secret.

We are not dealing with a claim of secrecy that is allegedly necessary for the execution of executive functions, as in the case of confidential Presidential communications. As the related provisions for trade and commercial secrets indicate, it is the citizen's "right of privacy" that is involved.[26] It is hardly maintainable that protection of the citizenry against injurious disclosure to Congress is a necessary attribute of executive power. The test of an implied power ordinarily is whether it is "necessary and proper to carry into effect" an express power.[27] The power to withhold information for protection of a citizen is not "necessary" to carry out an executive power. Nor can it be "proper" on that ground to thwart the established legislative power of inquiry. The President was not made the protector of the public against the representative assembly, except to the extent that he may exercise the veto power.

On the contrary, the English and American people have had a deep-seated conviction, as Justice Brandeis reminded us, that they "must look to representative assemblies for the protection of their liberties."[28] It is Congress, rather, that is to protect the people against Presidential excesses, as the power to impeach testifies. Protection from unauthorized legislative action was confided to the courts, not the President; for protection of his "right to privacy" the individual may invoke judicial aid.[29] In sum, I consider that there is no "presumption" in favor of withholding "confidential" information from Congress. In fact, fundamental principles of our Constitution give rise to a presumption that runs the other way.

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[22] *McGrain* v. *Daugherty*, 273 U.S. 135, 177 (1927).

[23] The Federalist No. 51, at 338 (Mod. Lib. ed. 1937).

[24] *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

[25] "If a legal rule fails to satisfy the untechnical requirements of ordinary common sense the premises behind the rule had better be carefully examined." *Gavin* v. *Hudson & Manhattan R.R.*, 185 F.2d 104, 105–06 (3d Cir. 1950) (Goodrich, J.).

[26] For example, exemption 4 of the FOIA, 5 U.S.C. 552(b)(4), is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Of such an exemption it was said, "This provision was designed to prevent the unwarranted invasions of personal privacy which might be caused by the Government's indiscriminate release of confidential information." *Grumman Aircraft Engineer Corp.* v. *Renegotiation Bd.*, 425 F.2d 578, 580 (D.C. Cir. 1970) (footnote omitted).

[27] *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936).

[28] *Myers* v. *United States*, 272 U.S. 52, 294–95 (1926) (dissenting opinion).

[29] The Court referred to its "responsibility . . . to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy . . . ." *Watkins* v. *United States*, 354 U.S. 178, 198–99 (1957).

(2) CONSTRUCTION OF THE STATUTE

Because a few statutes have made explicit exceptions from confidential treatment for Congressional requests, the Attorney General argues that when "such an exception is not provided, it is presumably not intended."[30] The cited exceptions relate to information obtained by the Civil Aeronautics Board and by the Department of Agriculture respecting commodities markets.[31]

There appear to be at least 100 statutory provisions that govern confidential treatment, which range across the entire governmental spectrum.[32] The Attorney General would erect a wall around all such information. Under his interpretation special sanctity would attach to "confidential information" furnished to the Securities and Exchange Commission but would be denied to the Civil Aeronautics Board, when the fact is that every branch of business attaches equal value to "commercial and financial" secrets. This is not the situation for doctrinaire application of the maxim *expressio unius, exclusio alterius.*[33] The legislature domain covers so vast a terrain, responsibility is scattered among so many Committees and Subcommittees, that we should treat the two cited instances as illustrative of cautious legislators in the given instance rather than a declaration of an across-the-board Congressional policy that in the absence of such provisions Congress has disabled itself from inquiring how the laws are being executed, even if only pro tanto.

In truth, *Congress cannot abdicate constitutional power,*[34] even if it were so minded. It can delegate constitutional functions in part: but delegation is not abdication. A construction which suggests an abdication of power raises a constitutional doubt which should if possible be avoided.[35] This alone should counsel against a construction that Congress has walled itself off from complete exercise of its "oversight" function, from asking its delegate "how are you performing the delegated task"?

(a) The Legislative History

The legislative history upon which the Attorney General relies does not make out his case.

(i) He relates that: "In 1956, however, when a bill to extend the 1949 Act was before the Senate, the Senate Committee . . . considered, but did not adopt, an amendment which would have *required* the agencies to comply with any demand of a congressional committee for documents concerning administration of the 1949 Act. . . . In explaining the failure of the Senate Committee . . . to adopt the amendment, its chairman stated that, because the amendment involved an important constitutional principle (the question of the power of the executive branch to withhold information from Congress), the committee decided that inclusion of such a provision in the Export Control Act at that time would be inappropriate."[36]

Chairman Fulbright also stated, however "The committee, of course, wanted to make it clear that the omission of the amendment from the bill, as reported, was *not intended as any indication whatever* of the committee's view on the subject of the amendment. . . . On the contrary, the committee's omission . . . should be considered only as an indication that the committee feels the subject should be explored more fully in the appropriate committee.

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[30] Opinion at 5.

[31] 49 U.S.C. 1504; 7 U.S.C. 12-1.

[32] A Library of Congress review of the United States Code made at the request of the Subcommittee on Oversight and Investigations preliminarily indicates that there are at least 100 Federal statutes similar to section 7(c).

[33] "[N]othing," said Judge Learned Hand, "is so likely to lead us astray as an object reliance upon canons of any sort . . . ." *Van Vranken* v. *Helvering*, 115 F.2d 709, 711 (2d Cir. 1940), *cert. denied*, 313 U.S. 585 (1941). Rules of construction, the Supreme Court held, "do not solve the special difficulties in construing a particular statute." *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952).

Congress has known how to limit its own access to information. For example, section 1 of Public Law 92-403, 1 U.S.C. 112b, provides that certain international agreements shall be transmitted only to two named Committees. A similar provision is contained in the Internal Revenue Code, 26 U.S.C. 6103(d), 6104(a)(2). One might equally argue that in the absence of such limitations Congress itself may call for information.

[34] *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935). In the Jay Treaty debate, Mr. Havens "laid it down as an incontrovertible maxim, that neither of the branches of the Government could, rightfully or constitutionally, divest itself of any powers . . . by a neglect to exercise those powers that were granted to it by the Constitution . . . ." 5 Annals of Cong. 486. To the same effect, Mr. Nicholas, *id.* at 447.

[35] *United States* v. *Rumely*, 345 U.S. 41, 47 (1953); *Kovacs* v. *Cooper*, 336 U.S. 77, 85 (1949).

[36] Opinion at 6-7 (footnotes omitted) (emphasis in original).

It is my understanding that the Subcommittee on Constituitonal Rights of the Judiciary Committee is conducting a study on this subject, I believe this is a more appropriate group to consider this proposal." [37]

Manifestly, the Committee's careful disclaimer of any opinion on the matter does not support a claim that the legislative history supports the "presumption" against disclosure to Congress.

(ii) Next the Attorney General invokes an amendment proffered in 1962 by Chairman Kitchin, who explained to the House (I quote the Attorney General): "The present Administrator of the Act probably interprets [the predecessor of section 7(c)] as precluding him from furnishing such information to the Congress." He added that the amendment would clarify the authority of the Administrator and "permits—does not command—full disclosure . . . to either House of Congress . . . ." Subsequently, after the General Counsel of the Department of Commerce and the Secretary of Commerce had stated that *nothing in the present statute would prohibit* the Department from furnishing information obtained under it to a congressional committee. Congressman Kitchin withdrew his amendment. The congressman noted that the matter of disclosure . . . is "within the discretion of the Secretary of Commerce." [38]

The internal inconsistencies in Kitchin's remarks are self-evident. The Secretary's acknowledgment that the statute does not prohibit disclosure controverts the argument that section 7(c) constitutes a statutory bar to disclosure. Kitchin's remark that the Secretary has "discretion" to withhold from Congress represents one member's construction of a prior Act that is not, of course, conclusive,[39] and runs counter to many judgments before and since by various Committees that no such discretion resides in the Executive branch.[40] When Congress itself came to render its considered judgment, it took exactly the opposite position.[41]

(iii) The last instance cited involves parallel action in the Senate in 1962. Senator Keating proposed that "Nothing in this section shall be deemed to prohibit the disclosure . . . to either House of Congress" (a proposal later adopted by Congress, as will apepar), and stated that it "would reverse the presumption in the present law against disclosure . . . ." "Later," in the words of the Attorney General, "questions were raised about the effect of the amendment upon the treatment of trade secrets; and, agreeing that such issues required further study, Senator Keating withdrew the amendment." [42]

Keating withdrew his amendment because Senator Humphrey, though in sympathy with Keating's objectives, recounted that a company had expressed concern about "the possibility of information being made available to competitors . . . ." He assured the company that "that was not the purpose of the amendment," but sought reassurance from Keating. Keating agreed that such was not the purpose of the amendment, and stated that he was "willing to withdraw the amendment . . . to give an opportunity for hearings to be held on the subject. We do not want to injure unfairly any concern selling goods abroad . . . ." [43] The Keating reference to the "presumption" against disclosure is open to the same objection as was Kitchin's remark—it is one member's view of the meaning of a prior Act. And under all the circumstances, the postponement of the amendment does not spell rejection of Keating's desire to foreclose refusal of information to Congress.

In sum, the legislative history at best is inconclusive; and given the established power of legislative "oversight" it should require clear evidence of an

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[37] 102 Cong. Rec. 10405 (1956) (emphasis added).

[38] Opinion at 7–8 (footnotes omitted) (emphasis added).

[39] The Court has not been overly sympathetic to such subsequent interpretations by Congress itself. *Rainwater* v. *United States*, 356 U.S. 590, 593 (1958). And:

"Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment in the light of the interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change."

United States v. *Wise*, 370 U.S. 405, 411 (1962).

[40] *See, e.g.*, Senator Edmunds' (Chairman of the Senate Judiciary Committee) reply to President Cleveland in 1886, *discussed* in Collins, *The Power of Congressional Committees of Investigation to Obtain Information from the Executive Branch: The Argument for the Legislative Branch*, 39 Geo. L.J. 563, 569–73 (1951). *See also* the House's response to President Tyler's withholding, *discussed* in Berger, *supra* note 14, at 183–85.

[41] *See* text accompanying note 49, *infra*.

[42] Opinion at 9 (footnote omitted).

[43] 108 Cong. Rec. 11488 (1962).

intention to curtail it.[44] Such evidence, in my judgment, is not furnished by the legislative history.

(b) The "Administrative Construction" and "Reenactment"

The appeal to an "administrative construction" of an Act of Congress that reads against Congress itself is, to say the least, innovative. An agency would employ its own construction of a Congressional delegation in order to bar Congress from inquiring how the delegation is being executed. It is as if an agent were to claim finality for his construction of the powers entrusted to him by his principal. If that power was not conferred, it cannot be created by "administrative construction." As the Supreme Court said of the related "reenactment" issue, "the point is immaterial, for Congress could not add to or expand this statute by impliedly approving the regulation."[45] Still less can an agency enlarge its own statutory powers and correspondingly reduce those of Congress by its "administrative construction." That would be sheer bootstrap lifting.

As to the claim that by "reenactment" of the Export Act, Congress sealed the "administrative construction" into the statute, it suffices to say that "A plainly erroneous . . . construction does not become correct by any subsequent reenactment of the provision of the statute to which it pertains."[46] "Re-enactment," said the Supreme Court, "is an unreliable indicium at best."[47]

Finally, a conclusive refutation of the Attorney General's construction of section 7(c) as a bar to Congressional access, in my judgment, is furnished by the Freedom of Information Act (FOIA). In June 1966, section 3 of the Administrative Procedure Act (APA) was replaced by the FOIA. Subsection (f) provided, "nor shall this section be authority to withhold information from Congress."[48] House Report No. 1497 stated that: "Subsection (f) *restates* the fact that a law controlling public access to Government information has absolutely *no effect upon congressional access to information* . . . . Congress has additional rights of access to all Government information which it deems necessary to carry out its functions."[49]

Section 7 of the Export Control Act of 1949 exempted the functions to be exercised thereunder from the APA "except as to the requirements of section 3 thereof,"[50] an exception that was preserved in the revision of 1965.[51] Consequently the disclosure provisions of the Export Act were governed by the APA section 3. In 1967, the FOIA was codified in section 552, title 5, U.S.C.[52] Subsection (b) thereof provides that this section (like the predecessor section) "does not apply to matters that are . . . (3) specifically exempted from disclosure by statute," and like earlier subsection (f), it goes on to declare in section 552(c) that "This section is not authority to withhold information from Congress."[53]

The several arguments of the Attorney General premise that there is an ambiguity in section 7(c) of the Export Act that must be clarified by resort to the legislative history and the like. Minimally, these provisions of the FOIA con-

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[44] In *Pierson* v. *Ray*, 386 U.S. 547, 554–55 (1967) (footnote omitted), the Court stated that the immunity of judges from suits for acts performed in their official capacity was deeply rooted in the common law, and held:

"We do not believe that this settled principle of law was abolished by § 1983, which makes liable "every person" who under color of law deprives another person of his civil rights. . . . The immunity of judges . . . is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."

[45] *Commissioner* v. *Acker*, 361 U.S. 87, 93 (1959).

[46] *Clifford* v. *Helvering*, 105 F.2d 586, 591 (8th Cir. 1939), *rev'd on other grounds*, 309 U.S. 331 (1940).

[47] *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955). Former Solicitor General Erwin Griswold, onetime Dean of Harvard Law School, stated that "the mere reenactment of a statute following administrative construction should be given no weight whatever in determining the proper construction of the statute." Griswold, *Summary of the Regulations Problem*, 54 Harv. L. Rev. 398, 400 (1941).

[48] Act of July 4, 1966, Public Law 89–487, 80 Stat. 250 (codified at 5 U.S.C. 552(c)).

[49] H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11–12 (1966) (footnote omitted) (emphasis added); *see* S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965). This declaration refutes the gloss put upon section 7(c) of the current Export Act by Keating and Kitchin.

[50] Act of Feb. 26, 1949, ch. 11, § 7, 63 Stat. 9.

[51] Act of June 30, 1965, Public Law 89–63, 79 Stat. 209.

[52] Act of June 5, 1967, Public Law 90–23, 81 Stat. 54.

[53] Under section 8 (which was section 7 in the 1949 Act) of the Export Administration Act of 1969, the provisions of the FOIA, 5 U.S.C. 552, were made applicable to the functions of the Export Act:

"The functions exercised under this Act are excluded from the operation of sections 551, 553 to 559, and 701 to 706, of title 5. . . ."

Act of Dec. 30, 1969, Public Law 91–184, § 8, 83 Stat. 841 (codified at 50 U.S.C. App. 2407). Thus the Export Act is not excluded from the FOIA.

stitute a declaration of congressional policy—that confidential treatment provisions have "absolutely no effect upon congressional access to information"—that removes the ambiguity and should be given overriding effect. As the Supreme Court said in an analogous situation, "Congress, when the matter has come to its attention, has expressly recognized," in terms of our case, that such statutory bars are inapplicable to Congress, and "the same intent should be implied as to" section 7(c).[54]

In fact, the case is much stronger: if we give to section 7(c) the construction put upon it by the Attorney General, it becomes a "specific exemption from disclosure by statute." Now the combined effect of sections 552(b)(3) and 552(c) of the FOIA is that a specific statutory exemption from disclosure does not apply to Congress. On the Attorney General's construction, section 7(c) does apply to Congress. The FOIA and section 7(c) are on this reasoning inconsistent. The rule is that if two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first. . . ."[55] To the extent, therefore, that section 7(c) bars Congressional access to confidential information, it is inconsistent with the later FOIA and was superseded pro tanto, repealed by implication.

In my opinion, section 7(c) of the Export Act is not applicable to a Congressional demand for confidential information; it does not absolve the Secretary of Commerce from compliance with the subpoena of your Subcommittee.

Respectfully submitted.

RAOUL BERGER.

Mr. MOSS. Thank you.

I find that I do not have any questions because the opinion you have given is so clearly along the lines of my own convictions and, as you know from our association in the matter of the executive privilege and availability of information, I have held them very strongly under Presidents of both political parties.

When we contacted you I expected that you would do a very well reasoned job of giving your views. You have lived up to those expectations fully.

I am pleased now to recognize the gentleman from Texas, the ranking minority member of the committee, for questions.

Mr. Collins.

Mr. COLLINS. Thank you very much, Mr. Chairman.

I appreciate the fact that Mr. Berger started by referring to Justice Frankfurther, who I think is probably the most able constitutional lawyer of this century. We lack much of that constitutional law on the bench.

I am not a lawyer myself. I just know about this subject we are investigating as I see it from about three points. Now you are a lawyer. One of them is the question of national interest, and the other one is the question of boycott, which are the basic issues that concern our committee on how we press this individual on whether he should divulge the information or not.

Mr. BERGER. That is an issue of judgment. I didn't address myself to that. I may say I looked at the problem, divorced myself from the boycott and the Arabs. I looked at this as a lawyer.

Your problem under the Attorney General's opinion is, first, do we have a right to require this information, or have we barred ourselves from it? After you have that problem settled to your own satisfaction you can debate, is it in the national interest for us to require it?

But what is crucial is who is to make that determination? The fellow you hired to do the job or you?

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[54] *Harris* v. *Zion Saving Bank & Trust Co.*, 317 U.S. 447, 452 (1943).

[55] *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870); *see United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921).

Mr. COLLINS. As I understand it, we specified it was up to him to determine our national interest.

Mr. BERGER. Vis-a-vis whom? You jumped a hurdle, Mr. Congressman. If they had said, "No department shall publish or disclose information obtained even to Congress unless he determines"——

Mr. COLLINS. Unless he determines. It is the Secretary who determines the national interest question.

Mr. BERGER. Vis-a-vis the public? You have to jump that hurdle first.

Mr. COLLINS. It is up to the Secretary to determine. Now we get into the subject of boycott. Let me ask you something about boycott.

Mr. BERGER. I am not prepared to address myself to it. I am not an expert on boycotts. I have no views on it. You are better informed than I am. I don't care a hoot in hell what you do with the merits of it.

Mr. COLLINS. The subject is boycotts in the national interest.

Mr. MOSS. Will the gentleman yield? The Chair requested Professor Berger and two other well recognized constitutional experts to address themselves only to the brief, the opinion, of the Attorney General of the United States, advising the Secretary of Commerce on the rights of the Congress to the information. The collateral questions to be considered later by the committee as to whether or not we have the wisdom, the judgment to handle the information in a responsible manner, are not dealt with in any of these opinions. They address themselves only to the basic constitutional and statutory questions involved in the laws which the Secretary of Commerce is called upon to administer and how he is administering them.

Mr. COLLINS. Thank you, Mr. Chairman.

You have repeatedly kept hammering home that Congress has the responsibility to follow up and take on action where it is needed. In this question the entire issue is, is boycott an issue which is of that paramount importance?

Because here we have a Congress, and I think this is something that will concern you, this Congress that is sitting right now passed a law that said that secondary boycotts were legal within the United States. This is the policy of this country, that we say not just boycotts but secondary boycotts.

We have members of our committee who voted in favor of secondary boycotts. If this is the law of the land how can we as a Congress consider it in our national interest to go out——

Mr. BERGER. Mr. Congressman, I am not going to pretend to sit as a member of your committee who will decide that question. There is a threshold question. The threshold question, if I may rivet your eye on the ball, is who has the right to decide that? The Secretary of Commerce or your committee?

I don't care how you decide it, I am not going to address any aspects of that decision. That is for you to decide behind closed doors. But the right to decide is what the Attorney General is talking about. What I am talking about. You have that right. And whether the problem involves war powers or secondary boycotts or labor relations or anything else, or taxes, it is all one and the same to me.

Who decides? Congress decides, not its delegate.

I may say to you I am not a bashful fellow. I am almost 75: a battle scarred veteran. When I know something I speak very freely about it.

When I don't, I wish to withhold my opinions. Now it is useless to try to get expressions of opinion from me about boycott. No. 1, because, if you will forgive me, I don't think that it is germane. It is your job to decide, taking into account what you have told me, whether or not you want the information. No. 2, nothing I can say about boycotts will be enlightening, and I feel I am not qualified. So, if you will forgive me, let us leave that.

Mr. COLLINS. Let me go back to another part of this which is foreign relations. This is not the Foreign Relations Committee, but what we do could have an impact on foreign relations.

The peace in the Middle East some of us consider our greatest responsibility in Congress. We are moving out of our own field. Do we have the jurisdiction within this Commerce Committee?

You have talked about the powers to move into the field of foreign relations.

Mr. BERGER. I haven't seen your charter. I don't know what the charter of powers is that has been drawn for the committee.

Mr. MOSS. If the gentleman will yield, the Chair is vested with the authority to make that ruling. The Chair obviously, in convening the hearings to discuss with the Secretary of Commerce and the committee by a significant majority vote in the issuance of a subpena duces tecum to the Secretary, made the decision that we had the authority and that we required the information.

The refusal on the part of the Secretary did or did not constitute an act of contempt for the powers of the Congress. So, clearly while there are foreign affairs issues, or collateral issues, the committee in its charter under rule 10 has jurisdiction over interstate and foreign commerce generally.

It also has authority to regulate the securities exchanges of this Nation, and the stocks of most publicly held corporations traded upon one or more of these exchanges. How are they affected? What are the rights or is there an impairment of rights of shareowners of those securities is a matter which is most relevant to the powers of this committee.

We have jurisdiction over the Securities Exchange Commission Act. The act guards against unfair trade practices. Are we in fact being confronted with unfair trade practice? Are there advantages conferred upon one as opposed to the other? These are matters which only given the facts can we finally determine.

But our power to inquire is very clear, and very unequivocal in the rulings of the House of Representatives.

Mr. BERGER. Let me add one thing that strikes me, Mr. Congressman. Possibly you are more acute than the Attorney General, but it certainly strikes me as extraordinarily significant that he did not challenge the jurisdiction of this committe. That is the earliest challenge that a lawyer makes, "you have no jurisdiction to inquire." That would have been deadly. That is all he had to establish. That suggests to me that you may be following a cold trail.

Mr. COLLINS. That is a good answer on that one.

Let me take one final one. On the issue of how far a responsible party, one of the people that we have set up an agency, have their responsibility to us. This is not an operational question that we are

asking the Secretary as to what he did, how he ran his department or anything else. We are asking him to bring us information which was given to him by other parties. We are asking him to turn loose material which was given to him in confidence.

Now this is a constitutional question. How do you determine that?

Mr. BERGER. I thought I answered that. I don't think it is a constitutional question at all.

First, I want to make it plain that it is operational. You don't know how he is performing his duty unless you know what is being fed in the machine. What information is he acting upon? Second, what you are talking about is what is known as the right of privacy. If I have financial secrets, trade secrets, commercial secrets, and I turn them in, the Congress has recognized that those should not be disclosed pell mell to the public.

As I explained, the President is undertaking to protect the right of privacy against the Congress. The President has no constitutional right to protect the right of privacy against the Congress. That is quite different from the Nixon tapes case. In the tapes case the President said, "If I cannot talk to my confidential aides, to Kissinger, et al., confidentially, I cannot conduct the executive department." But no President can claim that "Unless I can protect the American public against exposure by this vicious Congress I cannot conduct my office." That is absurd. That is what he is claiming.

Mr. COLLINS. He went one step further in this situation. The Secretary was not a party to the conversation in any way. This is data given to him in which he was in no way involved. We are asking him to furnish this to Congress.

Mr. BERGER. That is right, as the Congress has a right to do. You could, for example, go to the individual companies with a subpena and demand it, and they could not withhold it from you.

Mr. COLLINS. But we did not.

Mr. BERGER. You don't have to. It has been collected. Why should you have to send out a thousand subpenas? They have been delivered under your statute. All you told him is not broadcast it to the public. But you did not tell him, "I am your partner, you should not tell me about it." In order to wrest that kind of inference it should be clear beyond peradventure that you said, "Don't even show me."

Mr. Congressman, I hope you will stay in Congress, and you may even live to see a Democratic administration. If you do I hope you will still be zealous to protect the prerogatives of Congress. I think that is more important than party ties.

I think the Attorney General was astute in staying within the statutory realm, because in essence what he is saying is that the President is the protector of the public against Congress. In this situation you always want to remember who created the departments. Who can wipe them out the day after tomorrow? The Congress can. They are there because you created them, you keep them alive; you can wash them out.

Now, a department has the temerity, after you give it a certain function and ask them about it, to say, "We can't even tell you about it." It is preposterous.

Mr. MOSS. The gentleman's time has expired. Mr. Scheuer.

Mr. SCHEUER. Mr. Chairman, I had a number of questions prepared before we received the witness' brief. However, between the brief and the oral testimony, I must say that every question that I had was answered. So, I would simply have to thank the gentleman for his brilliant testimony and make one or two observations.

The first observation is that you said it was our prerogative to make the decision about the boycott and how we get involved in it, and then we can move into the question of discussion behind closed doors. Let me assure you that just as we are demanding a certain openness from the executive branch in dealing with us, we can point to a certain openness in this subcommittee to the public that has previously been not so prevalent

I don't think we have had more than one or two closed-door sessions this entire year. The only executive session that I know of was to make the decision as to whether to bring the Secretary down here under a subpena.

We conduct our business openly. We conduct our markup sessions on legislation openly. Those doors are virtually always open to the public.

We believe that the same visibility that you see as desirable in our perusal and scrutiny of the executive branch affairs is also desirable in our relations with the public. We feel they have a right to know what we are doing. I am sure you would approve of the vastly increased level of openness with which we are conducting our business.

The second observation I would like to make concerns our need to know. The chairman of our committee cogently and brilliantly outlined many of these needs to know, particularly as they relate to the kind of legislation we need, and to the jurisdictional basis of our right.

In outlining the jurisdiction of the Interstate and Foreign Commerce Committee, thus elucidating our right to know, we must add that we also ought to know how the various different kinds of firms have reacted to threats from the Arabs.

There are three types of firms to consider. There are those that stood up and said. "No. If you want our product or service, you can buy it, but don't tell us who to do business with." Many of those firms were blacklisted. There are now 2,000 of them on the blacklist.

Then there are other firms who said the same thing and yet were not placed on the boycott list. Examples of these firms are the Ford Machinery Co., Ford Motor Co., Hilton Hotels, TWA, and General Electric. The latter is not only doing business all over the Arab world but is also supplying Israel with the jet engine for their Kafir jet fighter, perhaps the most strategic single thing that Israel gets from abroad.

Finally, the third category would be firms that were approached by the Arabs and knuckled under to their threats. This would include Chase Manhattan, Exxon, Texas Instruments, and many others. We don't know how many others, but we would like to know. We would like to ask this last group what, in the Arab threats, made them capitulate? We would like to ask them how much business they think they could have done with Israel if they had traded with Israel?

We would like to ask the blacklisted group, that is, therefore, doing business only with Israel, how much business they think they could

have done with the Arab world, in competition with other corporations in this country and in competition with other business entities around the world?

Such information would form the basis for measuring the degree to which they have been hurt by a corporation in this country which has said, "Yes; we will knuckle under," thus taking business from a corporation which has said, "We won't knuckle under." The information the subcommittee seeks would also help us to quantify the amount of business our country has lost to firms overseas.

I suspect that, if an American policy were established, forbidding U.S. corporations to participate in requests to boycott friendly nations, the Arabs would forgo the boycott rather than our goods and services. I believe the proof of this lies in the ability of some firms to stand up to the boycott and yet to continue to do business with the Arabs.

As they have stated publicly on many occasions, the Arabs will not allow the boycott to hurt them economically. Where there are products and services they need, they will put the boycott on the back burner.

I know you don't want to involve yourself with the pros and cons of the boycott, and I respect your feelings. But I feel the record should indicate some of the reasons why we want to know the identity of the firms who have opted to do business with only Israel, or with only the Arab countries, and those firms which, for reasons that interest us very much, have succeeded in doing business with all of the parties concerned in this Middle Eastern struggle.

Mr. Chairman, I don't have any questions. I wish I had questions, searching, provocative, intellectually challenging questions for the witness. But his testimony has been so conclusive and so penetrating that my questions would be redundant, and I thank him again for his marvelously interesting testimony.

Mr. BERGER. Permit me to make one comment, Mr. Chairman, very much in line with my reply to Congressman Collins.

First, of course, I heartily endorse what is a model proceeding—to do business out in the open. I think that is great. That is how you build trust in the Congress. You saw an example of that with the House Judiciary impeachment proceedings. The American people first rallied behind the Congress when they saw you as a branch of decent human beings, trying to do the job. That is all you need. The minute you shut your doors you breed the same distrust as did the White House.

For me the important thing is not what you are going to consider when you sit down to consider it. You and Mr. Collins, and the rest of you will have all sorts of ideas. The important thing, really, Mr. Collins, is that policymaking should be in the hands of the Congress.

I wish to emphasize, even in the realm of foreign relations, you should have a share in policymaking. I was asked to testify on the Israeli agreement, I may say, parenthetically, and I want to underscore this, when I speak as a lawyer I try to do the most honest, clear job I can do. I am not swayed. My opinions, sir, cannot be bought. My services, yes, but not my opinions.

The thing that I am anxious always to preserve is participation in policymaking. That is what we are talking about. The ingredients of

policymaking are for you; I want you to make the policy or at least to share with the President in policymaking.

Even in foreign relations—I took pains to investigate that—I am satisfied that it was intended from the very beginning that the Senate should be a participant in making policy. I think the policy that is flashed on the Congress at the last minute, sign on the dotted line, is bad. I am consistent. You make the policy. What it should be I leave for you. I won't express any opinion.

Mr. SCHEUER. May I just ask one question. You told us when you started off that you were going to be stoic and you were. You were totally diffident, but if you were requested to shed that mantle of diffidence and stoicism to give us a last message, what would you say?

Mr. BERGER. I am not Billy Graham. I am just a lawyer. As a last message I would come back to what I have already said. Taking Congress as an institution I am with Brandeis; I put my faith in it.

There are many fine men in it that try hard. I have seen it time and time again. Most of all I put my faith in the fact that you debate the issues, that you don't have these dreadful conversations behind closed doors by sycophantic men. I think the truth emerges when you get debate. The American people are then more capable of judgment.

Now it may very well emerge, Mr. Scheuer, that if the whole Israeli issue were to be debated the public might be very indifferent to it. They might even with respect to participation in helping Israel vote against it. Those of us who feel sympathetic to Israel will just have to say that is the democratic process, that is the country we live in.

Holmes said a marvelous thing which is well worth remembering for you in Congress too, "I think the American people have a right to go to hell in their own way." It is well to remember that.

You will blunder, but you are the one who has to make the decision in the first place. I don't want to have anybody telling you that this is too much for you to know. I want you to know. I feel if you know you will thrash these things out. You will speak your mind. Mr. Scheuer will speak his mind. Something will emerge, a consensus, maybe a compromise.

I am an old man; and I have an abiding faith in democracy. I am disappointed from time to time by how democracy functions. I did not need Watergate to teach me about Nixon, but I accepted his reelection because the people have the right to go to hell their own way. The best we can hope for is that they should exercise their judgment.

Mr. MOSS. Thank you.

The gentleman's time has expired.

The Chair recognizes the gentleman from New York, Mr. Lent.

Mr. LENT. I would like to add my words of welcome to our distinguished guest today. As one whose most treasured possession is a letter of rejection from the Harvard Law School I find myself in somewhat of an uncomfortable position trying to match wits with the distinguished professor.

But as the distinguished professor said earlier, the threshold question that we meet on today, at least as I understand it, is whether the Secretary of Commerce in refusing to honor this committee's subpena, did or did not commit an act of contempt of Congress, and whether sub-

sidiary to that he was correct in abiding by the opinion of the distinguished Attorney General, who perhaps is almost as distinguished in his legal credentials as is our witness here today.

I know that I am going to have a great deal of difficulty in resolving this conflict between two giants of the legal community as regards this issue that is before us.

Professor, I note from your opinion—and from your comments here in discussing Watergate and Nixon and the tapes case, and the Ervin committee case, and executive privilege, that you seem to spend a great deal of attention and time discussing the issue of executive privilege. You do not understand that this issue that we are concerned with is an issue of assertion of executive privilege, do you?

Mr. BERGER. It is rooted in the doctrine that there was a presumption that information may be withheld. That is Brownell's presumption. Do you want me to read the language to you?

Mr. LENT. I don't want you to read Brownell's language about the presumption and so forth. My point is that when the Secretary of Commerce testified before this committee he made it abundantly clear that he was not asserting the doctrine of executive privilege. In my opinion it seems to me that in even discussing that issue and Watergate and Nixon and the tapes case and all this other business that I have heard today that we are in fact dragging a red herring across what the true issue is.

Mr. BERGER. I will leave the herring dragging to you, Mr. Congressman. I am not given to dragging herrings.

Mr. LENT. Good.

Mr. BERGER. Do you want me to address myself to your question? You have made a statement. I would like to comment on it.

Don't be taken in by jargon. Executive privilege is just a label. Let us get to the guts. The guts is on the very first page of the Attorney General's opinion. He starts out by saying that the foregoing opinions are under the general assumption that statutory restrictions are presumptively binding even on Congress.

In the face of a statute that is silent on the issue he says there is a presumption that is binding. I just read the opinions he cited. There in Brownell I found that he was making appeal, without mentioning the words executive privilege, to the doctrine that there is a presumption that you don't have to turn over information to the Congress. What is that but the executive privilege doctrine? Now you are talking to a man who knows the doctrine.

Mr. LENT. Let me just try to ask you the questions and you respond, because I have a very limited time.

Republicans have a very short time when they get a chance to talk. I did want to point out that in his letter to the chairman of the committee of August 22, 1975 the Secretary of Commerce was explicit in stating that he was relying on the statute, section 7(c), of the Export Administration Act, and he said, "I should reiterate that I do not base my position on any claim of executive privilege but rather on the exercise of a statutory discretion conferred upon me by the Congress."

I just think that much of the discussion which has taken place here today about executive privilege and Watergate, the tapes case, the Nixon case, and so forth, is quite a bit apart from the essential issue

that we have here before us, and that is whether or not Congress in passing section 7(c) precluded itself from access to this material that the Secretary of Commerce collects.

Mr. BERGER. Apparently I haven't made clear to you what I regard as the basic question. You are taken in by this jargon, these disclaimers. But whether or not the statute bars Congress, he starts off from a presumption and that presumption is grounded on the doctrine that the Executive does not have to turn over information to the Congress as the constitutional doctrine. That is the language of Brownell. Bother Mr. Morton's disclaimers, "I am not talking about executive privilege." When the Attorney General comes to write his opinion and writes about a presumption he also is very chaste, he does not refer to the words executive privilege. He says this presumptively bars Congress. What does he invoke? Brownell, who bases it on a long practice, Presidential claims that Presidents don't have to turn over information. I submit to you that that is the doctrine of executive privilege pure and simple.

If the presumption exists, of course, you start off with a loaded statute. So you have to start out by showing, as I did start off, that there is no such constitutional presumption.

Mr. LENT. I would respectfully submit that this whole discussion about executive privilege is nothing more than a red herring. I regret that it even had to come up today. I don't think it is part and parcel of our discussion. We are talking about the statute.

Mr. BERGER. You started off by calling me a giant and wind up by having me dragging a red herring. There is something of an incongruity between the two. I am not a giant, I am not given to dragging red herrings.

I say you are entitled to your view. That is your view. I don't share it. We can go on from there.

Mr. LENT. The Attorney General is entitled to his view which is embodied in his opinion.

Mr. BERGER. Sure, another giant.

Mr. LENT. Speaking of giant, we have a true giant in Rogers Morton, who is almost 6 feet 5.

Mr. BERGER. That is the first giant you have mentioned.

Mr. LENT. He feels the same way the Attorney General does.

Now in discussing the statute you state on page 8 of your statement that Congress determines whether or not information in Government is to be kept secret. So you then acknowledge that Congress does have that power.

My question is, is that not exactly what the Congress did in enacting section 7(c)?

Mr. BERGER. It has the power to determine that information may be kept secret from the public. Does that add up to saying it determined that it should be kept a secret from itself? They are two different things.

Mr. LENT. That is not what the statute says. I say this. I wish that the Secretary of Commerce would have given this committee the information, but I do respect the fact that he feels that to give it over to us would be the commission of a crime. That he would be violating the express provisions of section 7(c).

Mr. BERGER. "Express?" Let us stop on the word "express". There is no express prohibition on delivering information to the Congress. How do you dispose, Mr. Congressman, of the cases which, reading such statutes, hold "this just means the public, it does not mean the courts?" How do you get rid of those cases?

Let me hasten to salve your wounded dignity. I am not a graduate of Harvard either. I am a common garden variety of lawyer.

How do you dispose of cases, a string of cases that construe statutes that say don't disclose to the public?

Mr. LENT. I don't think there is a string of cases——

Mr. BERGER. I have four or five cases, and I would like you to string forth even one to the contrary. I haven't found them. They may be there, but I haven't found them.

Mr. LENT. Certainly I would like to hear the name or citation of any case where section 7(c) has been interpreted. What we have really is the legislative history, and you have examined that.

Mr. BERGER. Let us stay with the cases for a moment. Let us not start moving over to legislative history. You may not have had a case that decided on 7(c); but as lawyers we know courts do not engage in ribbon matching like that. If you have similar disclosure statutes which said "don't disclose information which has been filed with you" and the courts have said, at least four or five that I have run across, three of them in this circuit, have said that doesn't apply to courts, you are not going blithely as a lawyer to brush aside five cases. You can't beat evidence with no evidence. You have to beat it with something.

Mr. LENT. How about not applying to the Congress? Do you have a case which says that Congress can get material from an administrative officer where there is a statute that says in words that are very explicit that that information could not be made public?

Mr. BERGER. Let us argue by analogy.

Mr. LENT. Just one case.

Mr. MOSS. Will the gentleman yield?

Mr. LENT. I would like to have an answer to my question.

Mr. BERGER. I will be happy to answer that question.

Mr. MOSS. Yes, of course.

Mr. BERGER. Mr. Congressman, if the law were within your narrow strictures it would be hogtied. You are asking me for a ribbon-matching case. You are asking me for a legislative case. I have court cases. If a prohibition of disclosure doesn't apply to courts why should it apply to the legislature that created the statute and delegated the function? It is a coordinate branch with the courts. You could just as well argue from the Nixon case. All that Chief Justice Burger held was that the confidentiality of the President has to yield to the administration by the courts.

Mr. LENT. By the courts.

Mr. BERGER. That is what you would say.

Mr. LENT. But not to the Congress.

Mr. BERGER. Scholars say, however, that by parity of reasoning it applies equally to the Congress. It started out just in the criminal case. So you can equally say show me one civil case. The next case that came along was a civil case because the law shows by analogy.

All I am saying to you is that Congress as a coordinate branch of Government, can apply the principle that a prohibition of disclosure is meant to apply to the public, not the branches of Government—the courts and by the same principle the Congress.

Now you have given me your thought. I have given you my thought. You are welcome to your view of it.

Mr. LENT. On another subject, Professor. You indicated earlier if you don't like the statute, repeal it or amend it, and that is Congress' prerogative. I have introduced a piece of legislation to amend section 7(c) of the Export Administration Act which says very simply that nothing in that section shall be deemed to prohibit the disclosure of any information obtained under that section to the Congress of the United States. What would your feelings be with respect to the passage of that sort of legislation?

Mr. BERGER. My feeling is that you are doing something that is superfluous: because of what Congress laid down the sovereign principles in H.R. 1497 on page 16. Under your procedure we would have to go through hundreds of statutes and amend every one of them. You don't need it because the Freedom of Information Act has made explicit that a law controlling public access to Government information has absolutely no effect on congressional access to information. How do you get around that?

Mr. LENT. My answer to that would be I am interested in the information. I am not interested in the confrontation with the Secretary of Commerce. If we are really interested in the information we would change the statute.

Mr. BERGER. You don't have to.

Mr. MOSS. Will the gentleman from New York yield.

Mr. LENT. I will be happy to yield.

Mr. MOSS. Let me say that I have no intention of taking the long route when there is a much shorter one which at the same time preserves the rights of this body. While it may be an interesting exercise to see whether or not the Banking and Currency Committee will want to consider the gentleman's amendment during this Congress, I do not intend to be estopped from carrying out the duties which I feel are imposed upon me as the chairman under the rules of the House until another committee has acted.

Mr. BERGER. May I add another thing. I think your suggestion, Mr. Congressman, is perilous. You are undercutting an existing statute and what House Report 1497 says. You are engaging in something which shows you have no confidence in what it said, that the statutory disclosure provisions have "absolutely no effect upon congressional access to information." Congressman Lent says, "I want to be deadly sure." I think you need no more.

This freedom of information was made expressly applicable—I should not say "expressly"—was made inapplicable to certain sections of the Export Act and, therefore, was applicable to those that weren't excepted. By its terms you can really say it applies to the Export Act. Why do you have to add something to the Export Act which is already governed by the proposition that no prohibition of statutory disclosure shall authorize withholding from Congress? Sec-

tion 7(c) has been repealed by implication if it has the content you say it has.

Mr. LENT. I don't know what that report is, but certainly it does not have the force of law. What I would try to do would be to change the statute, itself, to provide for disclosure.

Mr. BERGER. Let me comment on that if I may. The report explains what the proposition is. The statute says this section is not authority to withhold information from Congress. That is what the statute says.

Mr. LENT. Is it referring to section 7(c)?

Mr. BERGER. No.

Mr. LENT. Don't know what we are talking about.

Mr. BERGER. Look at page 7.

Mr. MOSS. Will the gentleman yield?

Mr. LENT. I will yield.

Mr. MOSS. Professor Berger, I think that as the author of the Act, and as one of the writers of the report, after engaging in at times acrimonious discussion with the Johnson administration, we meant in that report precisely what we said in that report.

Mr. BERGER. That is right.

Mr. MOSS. That provisions of this type were not applicable to the Congress of the United States or any committees thereof, and we did that in order to make very clear what was by any construction already clear, but we did it so that there would be no further mistake as to the right of the Congress, of the power of the Congress. What we need, of course, is a far more vigorous pursuing by the Congress of its own powers.

Mr. BERGER. Before I read this history, Mr. Chairman——

Mr. LENT. Will the gentleman yield?

Isn't it the fact that the chairman is one of the leaders in the Congress for inserting in statute after statute admonitions that nothing in that statute will be deemed to preclude the right of Congress to get at the information?

Mr. MOSS. The chairman has repeatedly in the drafting of new statutes before this committee upon which he serves and the Committee on Government Operations, inserted in, and again out of an abundance of caution, the clear language to make explicit that which is implicit, and that is all that the chairman has done.

Mr. LENT. I thoroughly agree with the chairman. I support him. I seek only to do that with this section of the Export Act. Reasonable men can disagree whether or not it is gratuitous. Once it is in the statute reasonable men will not disagree.

Mr. BERGER. I will not accuse a fellow lawyer of being unreasonable. At least I am not in that mood today. You are able to find Congress in section 7(c) where it is unmentioned, and yet you refuse to take at face value language which is unmistakable, which says that Subsection (f) restates the fact that "A law controlling public access to Government information has absolutely no effect upon Congressional access to information."

Now I am a veteran of 40 years of law practice. I don't do anything that is unnecessary. The Freedom of Information Act covers the waterfront.

Mr. LENT. What document are you reading from?

Mr. BERGER. I am reading from House Report No. 1497, which adverts to the Freedom of Information Act, which says that nothing in this section, enumerating, among other categories, statutes that prohibit disclosure—it preserves all the statutory exemptions from disclosure like Section 7(c)—nothing in this section shall be deemed to apply to Congress. My God, what can be more explicit than that?

Mr. LENT. If that is a mere report——

Mr. BERGER. I am reading from the statute now, not a mere report. And don't kiss off a "mere report" because at $10 apiece I will get a half dozen cases before an hour is gone in which the Supreme Court says that a report is the guide to construction of a statute.

But you don't need that. The statute is clear on its face. The statute starts out by saying in one subsection it gives the exemption from disclosure where the statute prohibits disclosure. Then it goes on to say this does not apply to Congress. That is the statute, not the report. You certainly respect the statute, don't you?

Mr. LENT. If that statute applies to section 7(c).

Mr. BERGER. You question that, sir?

Mr. LENT. It is not in the Attorney General's opinion.

Mr. BERGER. He did not even mention the argument.

Mr. LENT. It is in your report? Do you make that point in this report? I haven't had a chance to go over it carefully.

Mr. BERGER. You ought to.

Mr. LENT. I should.

Mr. BERGER. Lawyers like a court to read the briefs before the argument. Now I am sure you are going to read it because I startled you. Something you hadn't thought of.

Mr. MOSS. The gentleman's time has expired.

The Chair recognizes the gentleman from California, Mr. Waxman.

Mr. WAXMAN. Mr. Berger, I agree with your conclusion that what the Secretary is arguing as statutory interpretation is nothing more than executive privilege. I want to explore with you the doctrine of executive privilege.

As I understand it, this is a doctrine first brought forward in the 1950's by Attorney General Brownell. Do you see any circumstances where the doctrine of executive privilege would be appropriate—where the executive branch can withhold information from the Congress, short of Congress itself specifying that certain information is not to be furnished to us?

Mr. BERGER. As a matter of constitutional power I would have to say on the basis of my own extended study that historically there is no basis for it. There just was no curtain against inquiry. There is a wonderful statement by James Wilson who was later Justice of the Supreme Court and was next to Madison the great architect of the Constitution. He told the Pensylvania Ratification Convention: "The President is better when he has no screen to hide his negelect or inattention." The fact is, historically, inquiry knew no bounds. It was unbounded, untrammeled.

Mr. WAXMAN. If there is no executive privilege as a constitutional principle, aren't we really saying the inquiry by Congress to get information and the resistance of the Executive to give that information is nothing more than a political struggle between two branches of Government?

Mr. BERGER. Every act in our Government that involves a dispute between the branches inevitably involves political forces. I have never been abashed by that, because if you hadn't had an opposition party, for example, at the time of the Teapot Dome investigation, you wouldn't have had an exposure of all the horrors. It is probably in large part due to the fact that you had an opposition party in the Congress during Watergate that you succeeded. It is well to remember that those few Republicans like Sandman and Dennis and, if I am not mistaken, Wiggins, fought to the last ditch to shield Nixon. They only gave up when they found they had been betrayed, not the American public, that they had been betrayed because the President had lied to them. This is something to bear in mind.

It does not bother me when you talk about political struggles. Struggle for power is always political. The guiding question has to be where was the power lodged by the Constitution That is the beginning question.

Mr. WAXMAN. Then if the question is where is the power lodged by the Constitution, would you interpret the Constitution to mean that Congress has that power?

Second, if in fact the struggle to assert that power is nothing more than a political struggle, then how is it ultimately to be determined? Is the court to interpret the law?

Mr. BERGER. Notwithstanding what I regard as a very faulty opinion in the Senate select committee case, you have to turn to the courts. Congress asserts it has an untrammeled right to information. Until the *Nixon* case the Executive had claimed an uncontrolled discretion to withhold. Now we have learned it is not uncontrolled. But where you have this clash as to where the boundaries are between the two there is only on arbiter: that is the courts.

Mr. WAXMAN. If we involve the courts as the arbiter, isn't there a danger that court intervention will put limits on congressional power that the Constitution may not envision?

Mr. BERGER. It is a danger. I confess I was dumbfounded when I read the Senate select committee case for the first time. I thought it was an extraordinary opinion. Even so, Congress too has wandered. Now they have come back to the path. We must put our fai in the final interperters of the Constitution, the courts.

We do have one other resort. It can be used. It would not hurt at all to fluorish it in front of Mr. Morton. Disobedience of a subpoena is a contempt of the Congress. Contempt of the Congress is an impeachable offense. You know, Mr. Chairman, the Congress has never been able to nerve itself to go to bat here. It would not take too many incidents to teach a Colby a Morton and a Laird, and all the rest, that they must comply with the demand of Congress.

In England the Parliament just had the Sergeant At Arms throw recalcitrants in the Tower. We don't have a Tower. But your Sergeant At Arms has been allowed to arrest private individuals; and he can also arrest officials of the Government.

I will conclude that I have been disappointed in the courts, even in *United States* v. *Nixon*; that, on first blush, is a very disappointing opinion. But all the scuttlebutt by the court watchers is that the brethren of Chief Justice Burger wanted to have a case that even the

intransigent Nixon would understand was definite. Nothing is more definite than nine men saying you have to deliver. Scholars opine that the "confidentiality" portions will die by the wayside. I am not going to let a couple of opinions destroy my confidence in the courts. I believe in the courts.

Mr. WAXMAN. For those of us who believe we ought to pursue this matter, that the Congress ought not to stand by and let the Secretary tell us we can't have this information, we can proceed by way of contempt, which then becomes an impeachable offense. Need we then go to the courts at all?

Mr. BERGER. Or if you go by contempt, you can actually arrest Mr. Morton. This is not something that is derogatory, it is not something that denigrates the man, I would tell him:

This issue ought to be settled. The way to settle it is, we will arrest you, bring you over, give you a nice office in the House with a bottle of whiskey at your side. You get in touch with your lawyers. They will get a writ of habeas corpus and spring you, and we will be in court.

Mr. WAXMAN. What would be the jurisdiction of the court when it ends up there?

Mr BERGER. In the habeas corpus proceeding which is established jurisdiction. Right now as a matter of fact, and I want to commend to all of you, Mr. Congressman, there is a Senate bill, S. 2342, Senator Muskie's bill, which I think is a fine approach to rationalizing the machinery, having an orderly way of dealing with these things.

I wrote about this 10 years ago. I warned the Congress that if you want to get into the court on your own motion without habeas corpus you have to confer jurisdiction on the district court. They are finally getting around to it.

There is another entry to the courts. A contempt of the Congress is a misdemeanor. Are you going to get the Attorney General to prosecute Mr. Morton? You need a special prosecutor for that.

Under the present setup you have two ways of going at it. If the House supports you by resolution and Mr. Morton resists, I would call him up and say, "Now look, we will arrest you; we are doing it to get in court. You tell your attorneys to prepare a petition for a writ of habeas corpus. They will get you out in half an hour."

That is one way of doing it. It requires a resolution of the House to get a contempt. There is no question of jurisdiction.

As a matter of fact, Mr. Chairman, to use a little lawyer's jargon, there are still some lawyers who are nervous about so-called "political questions." I think that has more or less been buried. But you avoid that altogether because a man who asserts he is illegally jailed, must be heard, "political question" or not. You have to get him out.

Mr. WAXMAN. If the court wished to assert the political doctrine——

Mr. BERGER. That is just one of the clusters of questions that will arise in the proceeding. To get a man out of jail is not a "political question." He is entitled to be free if he is being illegally held.

I will say to you, stand up for Congress and we will have a better Government as a result of it. You must not be told as Laird told Fulbright, "We don't think it is in the national interest for you to know."

The very fact that Morton won't find it in the national interest to make disclosure to you shows that he doesn't think it is in the national interest for you to know. I think that is effrontery.

Mr. WAXMAN. I agree with you.

Mr. BERGER. You are not going to get anywhere until you look at it as an institutional, not a party, question. You should act thus against a Democratic President?

Mr. MOSS. We have done it against two.

Mr. BERGER. Two. I will say against a Democratic President because I prize Congress as an institution. It has its mavericks on both sides, but if we can't put our faith in that institution we are a pretty sick chicken.

Mr. WAXMAN. Are there any circumstances where the President of the United States, or the executive branch, can withhold information from Congress?

Mr. BERGER. I would approach it in a different way. Let me repeat that as a matter of constitutional power and history, I am thoroughly convinced there is no doctrine of constitutional privilege, Mr. Chief Justice Burger notwithstanding. I may remind you that he found Presidential privilege inextricably rooted in the Constitution. Leonard Levy quoted the Chief Justice, when a colleague said something was "rooted in the Constitution," as stating "it may be rooted in the Constitution but I can't find it there."

To answer your question, first, the Congress has time and again shown no inclination to breach the confidential wall between General Bradley and Truman, between Kissinger and Nixon. It is only when Kissinger puts on 40 hats and has a special 500-man force over which his umbrella spreads that he gets into trouble. The Congress has always respected, and should codify its respect for communications between the President and his man Friday. That makes sense.

The second thing I would say, we don't want to have a reoccurrence of that frightful McCarthyism, cruel invasions of the right to privacy. You ought to stop always and think about that. Congress discredited itself; it is under a cloud of McCarthysim which has never really been completely dispelled. You ought to respect the right of privacy yourself.

But that is for you to determine. There may be considerations that in your judgment rise higher than that, just as in this case. I don't know. But I wouldn't ever permit the executive branch to say it is for us to protect the right of privacy against the Congress. The scales weren't weighted that way by the founders. Quite the other way.

Mr. WAXMAN. Thank you very much.

Mr. MOSS. Mr. Sharp.

Mr. SHARP. Thank you very much, Mr. Chairman.

I certainly appreciate the testimony of the witness. I just want to follow up on what Mr. Waxman said here. There were two separate courses of action. One is a contempt proceeding, and the other is a change in the statute?

Mr. BERGER. There are four avenues actually. The statute ought to be changed to confer jurisdiction of a suit by Congress, because you would have that option. You conceivably might have some officer who

would be recalcitrant; a file of Marines might meet the Sergeant at Arms. It would be a disgraceful spectacle but it is not outside the realm of possibility. Should we bring an impeachment proceeding for this?

I think impeachment is a great tool. It was designed for that situation. We can't have an officer of Government acting in contempt of Congress. So, you have impeachment as number one.

The proposed statute, S. 2342 I would urge everyone of you to espouse it, we should have it as number two. Your arrest for contempt, followed by a habeas corpus proceeding would be number three.

The fourth one is the misdemeanor statute. You ought to have a special prosecutor who can represent you in every conflict of interest with the Attorney General. It should be a presumption that when you and the executive branch battle that you can't have disinterested representation; and you should not have to hire somebody for the occasion. There ought to be somebody who gets seasoned in disputes with the executive branch, just as the Attorney General has a lot of boilerplate over the years that he has accumulated.

In sum, you have (1) a criminal proceeding, (2) your new statute, (3) your Sergeant At Arms arrest resulting in habeas corpus proceeding, and (4) in a really serious case I would impeach a man who defied the Congress, and there is parliamentary history for that.

Mr. SHARP. Thank you very much, Mr. Chairman. I appreciate the time.

Mr. MOSS. The Chair recognizes the gentleman from New York, Mr. Scheuer.

Mr. SCHEUER. Just a brief question. What is the constitutional history of impeachment of a Cabinet officer for defying the Congress?

Mr. BERGER. You don't have any here in America. The truth is you never really had an executive officer that defied the Parliament. I can recall offhand one case, a Solicitor of the Treasury, Nicholas Paxton. He was immediately thrown in the tower.

Mr. SCHEUER. Do we have a tower available in Washington, Mr. Chairman?

Mr. MOSS. We have a dungeon in the Capitol.

Mr. BERGER. You can keep him in the guard room of the House, but as I say the way to really handle it here is to look at it as an avenue of entry to the courts. I would tip off Mr. Morton because I think he is basically a sensible man. I would say, "We are trying to get this solved. The only way it can be solved is to have the sergeant arrest you and bring you here. You tell your attorneys to prepare a petition for writ of habeas corpus and they can very expeditiously procure your release."

I should remind you that unless you actually have custody of Mr. Morton the writ of habeas corpus does not lie. So there is no escape from that.

Mr. SCHEUER. If he has access to the Army, the Navy, and the Marine Corps it might be difficult for the Sergeant At Arms to make an arrest.

Mr. MOSS. We would get into a constitutional never-never-land, the questioned wisdom of a commander of any unit of the Armed Forces moving against the Congress.

Mr. BERGER. It would be a magnificent spectacle. You should tip off all the television crews in the land and let them be there. It would be worse than—who was it in the segregation case standing up against the Army?

Mr. SCHEUER. Wallace in Alabama.

Mr. BERGER. Then I would proceed to bring impeachment proceedings immediately. That is all you would need. You just can't defy the Congress.

Mr. MOSS. We hope that is not necessary, because the present Secretary of Commerce is a rather pleasant man who does not easily take on the role of a villain.

Mr. BERGER. I prefer that. In my own life once I have been convinced, Mr. Chairman, that what I am doing is right I have shrunk from nothing.

Mr. MOSS. That is true of the chairman also.

Mr. BERGER. That has to be. You know, we have not seen each other over a period of almost 20 years. I hope you will permit me to say I think that access to information owes more to you than any other man in Congress over the years, Mr. Chairman.

Mr. MOSS. Thank you. That is very kind of you.

Are there further questions?

Mr. Wunder.

Mr. WUNDER. Professor Berger, you acknowledge, one, that Congress has the right to insert in the statute language similar to what Mr. Lent suggested, that nothing in this section will preclude Congress from gaining access to this information?

Mr. BERGER. Could I deny it? Congress can enact any statute.

Mr. WUNDER. You also acknowledged in the past Congress has enacted language of that sort.

Mr. BERGER. It also has enacted statutes, for example, that information should be given only to committees and from that you could wrest implication opposite to that of Mr. Levi, you could wrest the implication, when it has not done that, it is entitled to the information.

In two statutes it said you should only furnish this information to these two committees. By implication that meant you could withhold it from Congress. So you could then reason, this means across the board wherever you don't find such a limitation, Congress can have it.

Really, I attach no importance to such inferences because I think if there are any implications—remember, you are wresting implications from the enactment of this statute—how do you meet subsection (f) and the explanation in the House report? You have to wrestle with that, Mr. Wunder. You don't escape a problem by wriggling around it. You have to meet it. How do you meet that? You are a lawyer.

Mr. WUNDER. It is your position that section (f) of the Freedom of Information Act takes precedence over 7(c)?

Mr. BERGER. Can you read the statute and deny it? On what reasoning would you deny it? The Freedom of Information Act was to apply across the board except for the express exemptions. The exemptions, the thing we are talking about, is 552. On each side of it the sections that were bracketing it were excluded by Export Act of 1969, 552 wasn't. So the Freedom of Information Act applies.

Now the Freedom of Information Act says no statutory prohibition of disclosure shall apply to Congress. How do you get away from that? So if we were to read the statute as Mr. Lent and Mr. Levi insist, it has been repealed by implication because no prohibition of statutory information applies to Congress.

Mr. WUNDER. Isn't that issue which reasonable men can differ on, Professor Berger?

Mr. BERGER. I may be an unreasonable man, but I don't think you can differ about that. To me that speaks in clarion tones. Look at the statutory language and explain to me why you refuse its effect. If men are reasonable, they have to be able to explain in a reasonable way why they are rejecting it, and I challenge you to do that. You admit, to use your tactic, you admit that the House report is the best kind of legislative history of what the Congress means? Just to get some crystal clear language in front of us, you will admit that; won't you?

Mr. WUNDER. When a statute is ambiguous; yes.

Mr. BERGER. Well, assume that the statute is ambiguous. We have a House report that tells us that a law controlling public access to Government information has absolutely no effect upon congressional access to information. How do you get away from that? Reason it and tell me how you escape from that.

Mr. WUNDER. What I think we have here is two statutes that may be in conflict.

Mr. BERGER. That is right. If they are in conflict you will also admit that the later statute repeals the earlier.

Mr. WUNDER. No.

Mr. BERGER. You don't admit that?

Mr. WUNDER. You are saying it was repealed by implication?

Mr. BERGER. That is right. That is what the Supreme Court says. I am not giving you a "reasonable man's" view. I am giving you what the Supreme Court said. You are not going to controvert that doctrine, are you? If you are, you are really being unreasonable.

Mr. WUNDER. I am not attempting to be unreasonable.

Thank you, Mr. Chairman.

Mr. MOSS. I want to thank you for a superb statement, and I might just further in support of your citation of the report on the Freedom of Information Act state that none of the statutory language in that bill was more carefully negotiated than the language in the report itself. I engaged in months of negotiations in order to overcome the continuing underlying threat of a veto. So, the report has the greatest pertinence to the language. It is very consistent with the language of the statute.

We knew what we were doing. We knew exactly what we wanted to effect. In citing the nine exemptions, that again was done with great deliberateness.

I do again express my thanks as I have had occasion to do on many previous occasions.

Mr. BERGER. Let me thank you. You know, when you are an old man you rejoice in feeling that you can still strike a blow for liberty.

Mr. MOSS. Thank you.

We now have as our next witness Prof. Norman Dorsen of the New York University School of Law.

Do you solemnly swear that the testimony you are about to give this committee shall be the truth, the whole truth, and nothing but the truth so help you God?

Mr. DORSEN. I do.

Mr. MOSS. Will you identify yourself for the record?

TESTIMONY OF NORMAN DORSEN, PROFESSOR, NEW YORK UNIVERSITY SCHOOL OF LAW; PRESIDENT, SOCIETY OF AMERICAN LAW TEACHERS; AND GENERAL COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. DORSEN. My name is Norman Dorsen. I am a professor of law at New York University. I also am president of the Society of American Law Teachers and general counsel to the American Civil Liberties Union. I have appeared in several Supreme Court cases, including *Nixon* v. *United States*, that related to the executive branch's right to maintain information free from public or congressional scrutiny; I have written on the subject, in an article coauthored with John Shattuck, entitled Executive Privilege, Congress and the Courts, 35 Ohio St. L. J. 1 (1974); and I have testified on this issue before several congressional committees, most recently before a Senate subcommittee chaired by Senator Muskie a few weeks ago.

The issue here concerns the right of Congress, through one of its committees, to obtain information in possession of the Secretary of Commerce relating to the Arab boycott of firms that trade with Israel. The policy of the United States, as stated in section 369.1 of the Export Administration Regulations of June 1, 1974, is "to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against any country not included in [certain groups of countries]." Israel is not included in any of those groups.

The Secretary has declined to hand over to this subcommittee the names of firms that have received any request to cooperate with the Arab boycott. This information was obtained by the Secretary on a form which states:

"Confidential. Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in section 7(c) of the Export Administration Act of 1969 (50 U.S.C. app. 2406(c))."

SEC. 7(c) of the act provides:

"No department, agency, or official exercising any functions under this act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof in contrary to the national interest."

Secretary Morton, while declining to furnish the names of firms, has supplied Congress with (1) a quarterly report showing the number of transactions in which U.S. firms have been asked to cooperate in restrictive trade practices, and (2) a summary of boycott information reported by exporters through June 26, 1975, showing the types of restrictive trade practices which were reported and the actions the exporters indicated they would take in response.

My conclusions on this matter are:

1. The subcommittee has the constitutional right to obtain the names of the firms from the Secretary of Commerce. The Secretary has not asserted a constitutional right to withhold the information, and section 7(c) should not be interpreted to apply to a request from the Congress.

2. But because of the confidentiality statute and the representation of confidentiality to the reporting firms, the subcommittee is, in my opinion, under certain obligations, which I shall refer to below:

The critical issue in this controversy is, of course, the proper interpretation of section 7(c). Before turning to it, I would like to share with the subcommittee some of the assumptions that are central to my thinking.

First, the power of Congress to investigate the executive branch is very broad and should be defeated, if at all, under very limited circumstances.

Second, there is in fact no constitutional privileges, whether denominated "executive privilege" or something else, to warrant the withholding of the information here. Nor is the information protected under the category of "trade secrets" that a firm would have the right to maintain in confidence.

Third, boycotts are not inherently good or bad from a moral standpoint, and in certain cases may serve acceptable purposes. Many people supported the boycott of Japanese goods before the Second World War, many supported a boycott of goods manufactured in Communist countries following World War II, and many now support the boycott of lettuce and grapes grown with nonunion labor. At this time I do not mean to approve or disapprove of any or all of these boycotts, but rather to remind the Subcommittee that boycotts serve many different ends. If it is pertinent, I should add that I personally deplore the Arab boycott of Israel, which is of a specially distressing character.

Fourth, the Export Administration Act, while stating that U.S. policy opposes boycotts of the kind under consideraton, does not render them illegal. Only a failure to report is rendered unlawful, and the remedy for a violation is not clear. Of course, the boycotts may be illegal under the antitrust laws, but that is a separate question, and a complex one.

Fifth and finally, I deplore misleading conduct on the part of the Government of the United States. If our Government is, as Justice Brandeis said almost 50 years ago, the "potent, the omnipresent teacher," it should not exercise its vast powers in a way that does not treat fairly with its citizens.

I turn now to the statute that is relied on by the Secretary of Commerce and the Attorney General. A series of arguments are presented for including requests by Congress within its meaning. I do not find them persuasive, and there are other contrary arguments which are substantial. Accordingly, I conclude that the confidentiality provisions of section 7(c) do not apply to requests for information by the Congress that are for proper legislative purposes.

The Attorney General argues that statutory restrictions upon exective agency disclosure of information "are presumptively binding" with respect to requests from congressional committees. But the basis

of this presumption is weak, resting ultimately on the "assumptions" of the opinions of prior Attorneys General and on statutes concerning confidentiality that contain explicit exceptions for congressional requests.

But the opinions of the Attorneys General, as I read them, are devoted to issues different from the instant one, and in any case do not, to me at least, reflect the assumption that Mr. Levi claims is present. While there are apparently several statutes that contain an explicit exemption for Congress, there are others which specifically *limit* congressional access to information, suggesting that when Congress wishes to impose limits on itself it does so explicitly. See the list of statutes appended to the memorandum of Messrs. Lemov and Barrett to Chairman Moss, dated September 5, 1975. If these sets of statutes tend to cancel each other out,[1] as I believe they do, there are two interrelated doctrines that weigh heavily on the side of congressional access. The first is the established power of Congress to obtain information to perform its important constitutional responsibilities. There is no need to repeat the well-known statements by the Supreme Court that this is a broad and essential power. *See*, for example, *Watkins* v. *United States*, 354 U.S. 178, 187 (1958); *Eastland* v. *U.S. Servicemen's Fund*, 95 S. Ct. 1813 (1975). Correspondingly, it is difficult to conclude that Congress intends to divest itself of the right to obtain information merely by implication in a statute that does no address the question directly. I at least would not do so absent other persuasive arguments.

These arguments are not forthcoming in the administration's presentations. The legislative history of the 1969 act is sparce. While it may be true, as Mr. Levi points out, that there has been a consistent administrative interpretation under the predecessor 1949 provision in favor of secrecy from Congress (although this was not demonstrated in his letter opinion), the Supreme Court has often said that it will not rely on such a practice if its independent interpretation of a statute leads to a different conclusion. For example, *T.I.M.E., Inc.* v. *United States*, 359 N.S. 464 (1959); *Zuber* v. *Allen*, 396 U.S. 168, 192–193 (1969).

Similarly, the Attorney General relies on the failure of Congress to enact amendments that would have clarified section 7(c) by precluding it from applying to congressional requests. Mr. Levi maintains that the history of the unenacted amendments reflects an understanding in Congress that the disclosure provisions did apply to Congress and that release was "within the discretion of the Secretary of Commerce." But this line of argument is not persuasive. In the first place, the congressional "understanding" is far more ambiguous than Mr. Levi suggests. And in any case, many rulings and most responsible students of legislative interpretation reject the idea that Congress can legislate by inaction, as in a situation like this where amendments are put forward to existing statutes and not passed. *See*, for example, *United States* v. *Wise*, 370 U.S. 405, 411 (1962); Hart & Sacks, The Legal Process 1394–1404 (1958).

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[1] The Lemov-Barrett memorandum also points to the practice of some Federal agencies to provide material to Congress that is otherwise subject to statutory confidentiality provisions.

In short, the Attorney General's arguments do not carry the burden of showing that Congress indirectly and by implication spiked its acknowledged power to obtain information to implement its broad oversight role in Government.

This conclusion in my view does not wholly dispose of the problem. The statute on its face assures confidentiality to complying firms and, as you know, the gist of section 7(c) is repeated on the report form that firms are requested to complete. While many firms certainly were able to hire lawyers who might have advised them that section 7(c) did not apply to congressional requests, it is nevertheless troubling to me that many firms may have relied on the Government's representation that information furnished would in fact be held in total confidence, even if this was an unwarranted legal conclusion. The consequence of disclosure will, at the minimum, be unwelcome publicity and, in some cases, lead to economic harm as retaliatory measures are taken by competitors, customers and suppliers.

It is arguable, of course, that because the Secretary of Commerce and not the Congress made the representation to the firms, the latter cannot justly complain if *Congress* forces the Secretary to divulge the names to it. But this is surely too facile, not only because section 7(c), which was enacted by Congress, is the prime source of the representation to the public but also because the separation of powers doctrine should not be used as a means to mislead.

It seems to me equally unavailing to rely on the contention that these companies, boycotting Israel in violation of American policy, come forward with dirty hands and therefore have no standing to complain if their identity is proclaimed to the world. While I have no sympathy for the firms, I do not feel that they disqualify from objecting to government action they deem improper. If there is a question of governmental misrepresentation here, it should not be overlooked because these firms are boycotters.

So the question is, what are the responsibilities of the Congress, and the subcommittee, as it deliberates the problem in this context. My suggestions are:

(A) The subcommittee should carefully review the issue of whether to press for the names of the firms;

(B) If the subcommittee does press and obtain the names, it will have at least a moral obligation to maintain their confidentiality, using them internally only for proper legislative purposes;

(C) The subcommittee should consider the possibility of clarifying the ambiguity of section 7(c) (and perhaps other confidentiality statutes) as it affects congressional requests for information. In any event, the Subcommittee should recommend to the Secretary that the reporting forms be clarified; and

(D) The subcommittee should support legislation analogous to S. 2730 to regularize procedures for obtaining information from the executive branch and securing court tests of disputed cases in proper circumstances.

In conclusion, let me emphasize that my concern about the possible misleading of firms does not impair my conclusion that the committee is entitled, as a matter of statutory construction and constitutional law, to the information it seeks. Nor do I attempt here to strike the balance between the subcommittee's need for the information and

the problems raised by the guarantee of confidentiality. That is a question for the subcommittee and ultimately for the Congress. My purpose has been to present the considerations as they appear to me to be relevant.

Thank you for the opportunity to appear before you on this important matter.

Mr. Moss. Thank you very much.

Mr. Wunder, do you have any questions?

Mr. WUNDER. Yes; I do, Mr. Chairman.

Professor Dorsen, why is it in your memorandum that you did not rely on provisions of the Freedom of Information Act as Professor Berger did?

Mr. DORSEN. I didn't mainly because I didn't think of it. If I had thought of it I am not sure I would have relied on it. I had not seen Professor Berger's testimony until today. I agree with his conclusion as to the meaning of these provisions but the reason I may not have relied on the FOIA anyway is that the hard problem here is not, in my judgment, the power of Congress. The problem is that people out there are being told, "Give us this information, give this information to the Government of the United States, we will hold it in confidence."

Under the principles of statutory construction that I think are proper, such language ordinarily is not intended to bar the Congress. Nevertheless, people are relying or might have relied on the general language of the provision.

Mr. SCHEUER. Will Mr. Wunder yield?

It seems to me that they may be harmed if it is divulged that they are flagrantly violating the public policy of the United States established by the Secretary of Commerce and our President. If this information, which indicates they are engaging in an unfair competitive practice, is divulged to their competitors, to their stockholders, to their consumers, and to the public they will probably suffer in the marketplace. But so be it.

The basis for their being hurt is the unfair practices in which they are engaging, in derogation of the interest of the United States. They are wrongly taking advantage of their competitors and in a sense they are acting out of prejudice by refusing to trade with other companies which allegedly have Jewish stockholders or owners or with companies which are alleged to be doing business with countries with which we are at peace. This might be deeply offensive to their stockholders and to their possible consumers.

Why are they entitled to the cloak of secrecy protecting and shielding their actions, which may or may not be illegal, but which are certainly violative of the express public policy of the United States.

Mr. DORSEN. I think you have stated the reasons why this is a difficult problem very well. I am going to make the same point that Mr. Berger did. I am not trying here to solve the policy problem that the members of this committee are going to have to solve.

The only possible answer to Mr. Scheuer's question is that the Government has misled the people if the information is coming into the Government's hand on the representation by the Secretary of Commerce that it will be held confidential.

Mr. SCHEUER. Let me ask a followup question. As you know, for this last decade the companies that have been approached by the Arabs

have been under a legal obligation to file but not to state whether or not they were complying with the Arab requests to observe the boycott. As you undoubtedly also know, as a result of the hearings that we had here last month, and in response to the questions of the chairman and myself as to why firms were not required to let the Department of Commerce know their stance on compliance, Morton said he would take it under advisement and, within 3 days we received a letter informing us that henceforward he would require them to advise the Secretary and the Department whether or not they intended to comply.

I immediately wrote back to Mr. Rogers requesting him to require the companies that have filed in the last decade or so but which were not at that time required to inform the Commerce Department as to whether or not they were complying, to refile and to state now whether they have or have not been complying with boycott requests since they were originally approached.

Now he has that request of mine under consideration. Do you think that this committee should request Mr. Morton, at such time as he does require them to refile and to state whether they have been complying with the Arab boycott requests, to notify the firms that this information will be available to the Congress and will be made available to the public and that we have no public policy interest in providing them with a further cloak of secrecy in carrying on a pattern of activity that is in flagrant violation of the professed and express public policy of the United States?

Mr. DORSEN. That is a question that I would have to give a top of the head answer to. I am not suggesting that the companies have a right to remain secret in violation of the policy of the United States. Therefore, I think if it is made clear to them that this information might be brought to the attention of Congress and the public, I see no problem at all.

Mr. SCHEUER. I want to get another answer from you. If there is a difference of opinion between the Secretary of Commerce and the Congress of the United States over whether these companies are entitled to a shield of secrecy in carrying on their activity in flagrant and direct violation of the express public policy of the United States, whose opinion is going to prevail as to whether they are going to continue to enjoy that cloak of secrecy? Is it the Congress or is it the Executive?

Mr. DORSEN. Here is where I agree completely with the general analysis of Mr. Berger, as my article in the Ohio State Law Journal states. Putting aside the issue of possible misrepresentation, this is information that the Congress has a right to obtain.

Mr. SCHEUER. I appreciate your answer, Professor Dorsen. Let me bring you up to date. When we heard from the Secretary of Commerce, via a letter dated September 25, he informed us that he had rewritten his regulations requiring companies to file. He told us that he had changed the forms in two ways, and, at that time, he sent along the new printed form with his letter. He must have effected this change immediately after leaving our hearing because he sent the new printed form within 72 hours.

Incidentally, I would like to go on record as thanking him for giving us a very swift response to a congressional inquiry, at least in this

limited line. I think in that case he certainly showed a forthcoming attitude.

Under question 10, where the form says we have not complied, we have complied, we have not decided, the language in the past years has been as follows: "Completion of the information in this item would be helpful to the U.S. Government but is not mandatory." That language has been striken from the new form.

You may be interested to know the result of our questions concerning the notice on top the old form, which read as follows: "Important. It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries in the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take, but are not legally prohibited from taking, any action including the furnishing of information, et cetera, supporting restrictive trade practices or boycotts." We questioned the Secretary sharply as to why he sent that weasel-worded signal to the companies, urging them not to participate in the boycott but, at the same time, telling them that they are not legally prohibited from participating in it. We said, "When you ask the American public to buy war bonds, do you tell them they are not legally required to buy war bonds? Why do you send them that wink, that nudge in the ribs?"

He said he would take that under advisement. His counsel said the Department was under a legal obligation to inform these companies that they were legally able to comply with the boycott even though it was an apparent violation of our public policy. Yet, when the new form was printed the words, "but are not legally prohibited from taking," were omitted.

Mr. DORSEN. That is an example of the power of Congress.

Mr. SCHEUER. It is an example of a man, as our chairman said, who is a decent, honorable man, who served here for 25 years, and who has some sense of where our heads are. He gave us what I consider to be a thoughtful and swift response when he realized he wasn't on firm ground. I hope he continues that forthcoming policy; he may perform a great service in helping us avoid a confrontation that none of us want. I did think you would be interested in knowing that he changed that form in two respects.

The second respect is of great significance to me symbolically.

Mr. DORSEN. Thank you.

Mr. MOSS. Mr. Wunder.

Mr. WUNDER. Thank you, Mr. Chairman. I would like to follow up the first question I asked. You said two things about the Freedom of Information Act. One, you did not think of it and, two, you might not have relied on it. Can you explain more fully why you might not have relied on it?

Mr. DORSEN. As I say, I think you asked me——

Mr. WUNDER. Why didn't you use that in your memorandum in support of your position?

Mr. DORSEN. The argument that Mr. Berger makes is that the section repeals the earlier law by implication. I have not recently studied that doctrine. I would want to see, for example, the cases that he cites on page 18—the *Tynen* case and the *Yuginovich* case. This is a case

where the Freedom of Information Act is in one section of the law and the section 7(c) is in another section of the law. I am not sure whether the doctrine of implied repeal applies to the statutes that are as far apart as those two statutes are. I am not saying they aren't, but I would want to check that.

Mr. WUNDER. Do you find any legislative history with regard to this section that would militate against the position taken by the Attorney General?

Mr. DORSEN. I read the legislative history that was sent to me. I thought that Mr. Levi's analysis of the legislative history was not persuasive, for example, when he said reenactment of the bill without the amendments indicates that Congress approved the administrative interpretation, there are cases which suggests that is not a reliable guide to the intent of Congress. Similarly, with some of the other arguments he made; for example, that amendments were put on the floor of Congress and then not passed.

As I said in my prepared statement, the failure of Congress to act is not a very reliable guide in determining what a statute means. There may be many different reasons why an amendment is not passed. He gave merely one possibility.

Mr. WUNDER. Let me ask this last question. In setting this up syllogistically, the major premise being Congress has the right to insert in the statute a provision specifying that nothing in this section shall preclude the executive branch from turning this material over to Congress; two, Congress has done this in the past; three, Congress failed to do it in this case, wouldn't an acceptable mode of statutory interpretation be that when you do it one time and you don't do it another you meant what you did the first time?

Mr. DORSEN. I deal with that on page 5. The trouble is that there are a lot of other statutes which specifically limit congressional access to information. They are all different types of statutes. Most of them are silent on the subject. Some are of the kind you mentioned. There are others that specifically limit congressional access. You can just as well say if Congress does not limit its access, therefore it intends to permit it. My own personal view is that those different statutes sort of cancel each other out and do not represent a firm guide to a solution here.

More reliable are the major premises concerning the relationship between Congress and the executive branch. Without necessarily going as far as Mr. Berger, without rejecting or accepting his view that there are no cases in which the Executive can withhold information from Congress, I don't see that this is one of them.

What is the ground in terms of principle that would support the Secretary's position? He himself said there is no constitutional basis. My independent analysis of it, during the writing of this article and various lectures I have given on this subject, confirm that there is no constitutional basis.

Then you are thrown on the statute, as we have discussed.

Mr. WUNDER. It is a hybrid of the statutes, isn't it?

Mr. MOSS. Let the Chair undertake some clarification at this point: 1949, I believe, was the original enactment of the Export Act. It was reenacted in 1969. Section 7 was contained in the 1949 act and in

the reenacted act. The reenacted act was specifically made subject to the provisions of the Freedom of Information Act, 5 U.S.C. 552.

Let us take a look at 552 of the Information Act. We come to the nine exemptions. There were a total of nine. This section does not apply to matters that are, one, specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy. Two, related solely to the internal personnel, rules, and practices of an agency. Three, specifically exempted from disclosure by statute.

It goes on then through nine. It concludes with this language: "This section does not authorize withholding of information or limit the availability of records to the public except as specifically stated in this section. This section is not authority to withhold information from Congress."

There we were dealing specifically, not by any inference, with an intent that we override more than the 113 statute which we had then identified which conferred authority upon officers of the Government to control information. We said where Congress seeks it you may not exercise that power against the Congress. That was the last expression of the Congress of the United States on that matter.

I submit that by any construction that is the law statutorily speaking at this moment. Would you disagree?

Mr. DORSEN. As I say, I did not study this particular question. I do not disagree on the basis of my hearing it here. The fact that you show, Mr. Chairman, that there was a specific link between the FOIA and section 7(c) is certainly an important point.

Mr. MOSS. I think it is well to bear in mind that for 11 years prior to the enactment of that act we undertook perhaps the most exhaustive series of hearings, the most searching inquiry in this whole field before we stepped out very timidly to assert a public right of access and then we made clear that the public rights and the congressional rights were indeed different.

Mr. Wunder.

Mr. WUNDER. I have no further questions, Mr. Chairman.

Thank you.

Mr. MOSS. Then I have just a few here. I think we ought to look with great care at the statute that is being administered by the Secretary upon which he places reliance. "No department, agency or official exercising any function under this act, 7(c), shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the persons furnishing such information unless the head of such department or agency determines that the withholding thereof is contrary to the national interest."

What discretion is conferred upon the Secretary by that language?

Mr. DORSEN. Not to publish or disclose unless he finds that the withholding thereof is contrary to the national interest. You are talking about his discretion vis-a-vis Congress?

Mr. MOSS. Yes. I am trying to come in now on the question of just Congress. Do we have a responsibility in the exercise of oversight to determine whether the Secretary is administering section 7(c) as it is written?

Mr. DORSEN. Yes.

Mr. Moss. In other words, if we are going to determine whether or not he has improperly disclosed, we must know what he has disclosed.

Mr. DORSEN. I think that is correct.

Mr. Moss. There is no other way we could do it except to take his word for the fact that he was adequately protecting the information which he had secured in confidence. If we are going to make that judgment then we would have to have all of the information available, would we not?

Mr. DORSEN. I think that is correct. I think the Congress has the power, and maybe even the duty to obtain all the information it can in an area as controverted as this one. I did raise the question before how important the names were to this information. While listening to the earlier testimony, there were statements made which suggested that the names might be important for you to be able to exercise your congressional responsibilities.

Mr. Moss. There are two ways we could do it. For instance, I might, after consultation with the committee, decide that there were a hundred corporations engaged in similar activities, one carefully adhering to the boycott requirements and the other ignoring it. I might want the Federal Trade Commission to undertake inquiry to determine whether or not there was experience by the nonobserving group, a disadvantage in trade, a valid exercise of the jurisdiction of this committee.

I would submit them to the Federal Trade Commission. Would that constitute a publication or a disclosure?

Mr. DORSEN. I don't think it would come within the terms of the statute. It depends on the words "no department or official exercising any functions under this act shall publish or disclose."

Mr. Moss. They would not be exercising that function under this act.

Mr. DORSEN. That's right.

Mr. Moss. We would be utilizing it. Is the reporting requirement discretionary with the firms or is it mandatory?

Mr. DORSEN. My impression is that it is mandatory.

Mr. Moss. It is a mandatory requirement that they report?

Mr. DORSEN. Correct.

Mr. Moss. Then do we in Congress have the responsibility to determine whether the firms are accurately reporting?

Mr. DORSEN. I would think so.

Mr. Moss. Can we do that with anything less than the full reports themselves as the basis for making judgments?

Mr. DORSEN. I honestly cannot answer that question. I realize that you probably don't think so and you may be right. I just do not know that.

Mr. Moss. Basically it comes down to the fact, one, the law. There seems to be no disagreement as to the law. The other goes to moral questions. But that is not an issue in the refusal of the Secretary to honor a subpena duces tecum issued under the authority of the Congress.

Mr. DORSEN. I believe that is correct. I have to say that when I looked at this problem, I had no substantial question after looking at the whole problem, that you are right to get this information. I am not prepared to go quite so far as my old and more confident friend

that no reasonable [illegible] can disagree. In the colloquy I had with Mr. Scheuer, without denying the force of the argument he made, I indicated that there is a certain moral ambiguity that is involved because of the way the representation is made.

That is a subject I am not an expert on, and I am not telling you what I think you should do on that point.

Mr. Moss. Let me say that we sought you out, you did not seek us out. We sought you out because you have a very fine reputation as a man of competence, a man of balance and one who would objectively undertake the examination of the question and give us your best advice.

That you are doing and that we thoroughly respect. All I am trying to do—first, I am rather presumptuous, I am not a lawyer.

Mr. DORSEN. You are not a lawyer, Mr. Chairman? I am very surprised to hear that.

Mr. Moss. One of the laws I helped write, after a long, long period of research, was the Freedom of Information Act. Since then, a great many pieces of administrative law—it has been mentioned here that we have, from time to time in new statutes coming out of this committee upon which I serve and the Committee on Government Operations upon which I have served out of, an abundance of caution inserted language saying that "nothing in this act shall in effect bar the Congress or any committee thereof from access to information."

Now, it has no effect on any action coming out of the committee. It does not mean that we have spelled out a doctrine that there must be an express mention of the Congress or the material becomes closed to the Congress.

As I said earlier, it did make very explicit that which we felt was at all times implicit. How can the Secretary of Commerce or any delegate of the Congress say to the Congress that "I am going to determine, one, that it is not in the national interest for you to know information that you require in order to intelligently exercise oversight over my duties as Secretary."

Mr. DORSEN. I do not believe that there is a basis for his doing so successfully and properly.

Mr. Moss. Let us examine the next: how far do we go?

It is my opinion that if we fail to go all the way here in this matter that we would then create a precedent that would be cited in perpetuity and lead to a diminishing of the powers of the Congress. When we issued the subpena duces tecum and it was not honored by the Secretary, then we joined the issue.

Have we any alternative now but to go forward?

Mr. DORSEN. Well, that is more of a—I was not consulted prior to issuing the subpena.

Mr. Moss. But it was issued?

Mr. DORSEN. Yes. That is a question, of course——

Mr. Moss. Would it create a troublesome precedent?

Mr. DORSEN. I am not so sure it would, to be candid about that.

Mr. Moss. I recall that back in 1954 there was a popular President in office and a very unpopular Senator conducting hearings on the other side of the hill, known as the Army-McCarthy hearings.

Mr. DORSEN. I have heard of them.

Mr. Moss. On May 18, 1954, the President of the United States instructed Secretary Stevens: "You will not respond to the questions of the U.S. Senate." Now, that was a very popular action, applauded by people widely across this Nation.

I think it constituted one of the most dangerous precedents in our history, and I have seen it recited time and time again as absolute authority for the President of the United States to assert a privilege which cannot be found anywhere nor I think can it be inferred from the Constitution of the United States.

Mr. DORSEN. May I comment on that?

Mr. Moss. Yes, indeed.

Mr. DORSEN. I was on the staff of Joseph Welch during the Army-McCarthy hearings in my first year or two out of law school. I remember that event very well, although it was as you point out over 20 years ago. I am still unclear about the merits of the decision, itself.

I agree with you that it has been used as a precedent improperly. It led to the blowing up of the executive privilege doctrine, which Mr. Berger calls a myth.

I agree with you that that was very unfortunate. But there were privacy interests at stake in those hearings. Privacy interests of the individuals involved that I don't think can be completely ignored even in retrospect.

Now, the reason I said a moment ago that I am not sure that if you decline to press this issue—and I am not advising you one way or the other on that, I am just giving you my analysis of the problem—the reason I said that it might not be, precedent that would undercut the powers of Congress, is because, if you decide not to press the matter I assume it would be because firms might have been prejudiced in some way by the representation on the forms.

I want to be very, very clear, I am not advising you one way or the other on that point.

Mr. Moss. I recognize that.

Mr. DORSEN. The problem here is a problem that in a sense is unique because of those forms. Now, I believe you have the power. I believe you have persuaded me sitting right here, and what Mr. Scheuer said before also persuaded me, that there are proper legislative purposes for obtaining the full reports. But if those names are leaked, if those names become public, there are people in my judgment who would have a legitimate gripe.

Even though I do not admire the boycotting firms, I would hate to see the Government put in a position where it can participate, however indirectly, in a problem of this kind.

Mr. Moss. Aren't you really expressing the hope that the Congress of the United States will be responsible?

Mr. DORSEN. Yes, I am, Mr. Chairman.

Mr. Moss. I certainly hope that that is the case. I think if they are not responsible, then those individuals who have conspired in the act of irresponsibility are answerable to a constituency, not to the President, not to the Secretary of Commerce.

Mr. DORSEN. I certainly do not quarrel; there are certain points here which are fuzzy. But there is one that is clear. I do not deny the power of Congress to obtain this information for proper legislative purposes.

There are these other factors and these are the considerations that I think are relevant; I tried to express what I think are relevant. It is up to you, of course, to make the judgment.

Mr. Moss. At this moment this committee has possession of over 200,000 subpenaed documents. Not one has been leaked or made public.

Mr. DORSEN. That is an admirable record, Mr. Chairman.

Mr. Moss. We are responsible. Sometimes, however, we may, in the balancing of a public interest, come up with a different conclusion than a Cabinet officer would. But then, we are accountable to an electorate. He is not. He is accountable to one man only.

I think that accountability to the electorate is one that we cannot lightly take, nor can the power we derive from them can we lightly abandon, give it up to the Executive.

Mr. Scheuer.

Mr. SCHEUER. Mr. Chairman, I think you have summed it up beautifully.

I would again press Professor Dorsen to give us his feeling as to when does the public's right to know—I think we have settled on the Congress right to know, we have no disagreement on that—when does the public's right to know prevail over the right of privacy of an individual or a corporation pursuing a course of conduct inimical to the public interest of the United States whose decision is that?

Is it the Secretary's? And do we have the legal authority to direct him, in requiring those corporations to file, to notify those firms that they will no longer enjoy a cloak of secrecy in their course of conduct which is contrary to the interest of the United States?

Mr. DORSEN. On the last point, I think the answer is that that would be a very proper and sound procedure, and to the extent that my view is sought on that question, I agree that you should do that.

On the issue of whether or not the public's right to know is superior to this right of privacy asserted by the firms, I believe, in general, the answer is that the public's right to know is superior.

The only problem I have here is this representation of confidentiality that could have been understood by some people to apply to Congress. I am not asserting, because this is a delicate matter and a number of factors, that that outweighs the public's right to know.

Mr. SCHEUER. Over the past 10 years or so, firms have been required to report that they have been approached, but they have not been required to notify the Secretary whether or not they have complied with the boycott.

Let us assume that, in answer to the request of myself and this committee, this distinguished Secretary decides to require firms who have filed but have not been required to notify the Secretary as to whether they have or have not, in the past, observed the Arab boycott and knuckled under to those demands. When Mr. Morton requires them to refile and to inform him as to whether they are complying or whether they have complied, should we direct him, since this is the first time that they have given him that crucial information, should we direct him to notify them that that information will be forwarded to the Congress and may be released to the public, that they cannot count on a cloak of secrecy?

Mr. DORSEN. I may have answered that question ambiguously before. I am very grateful to you for asking it.

On further consideration, I think you should do that. It would clear up the ambiguity for the future, and there will be no further problem of misrepresentation.

If he does not do it, he, at least, will be on notice that a majority of this subcommittee believes it has the power and that you expect that information for legislative purposes.

Mr. SCHEUER. Thank you very much.

I want to say that I have been a friend and a colleague and a great admirer of Professor Dorsen for those 20 years he has described. He has followed Professor Berger's example here in being diffident and stoic, but in his activity in New York City he has not only been a professional of great quality in the practice and teaching of the law but he has been a political activist of great distinction and great courage.

I have admired his work for several decades. I am delighted to have had him here. I want to tell him how much we have all appreciated his fine testimony.

Mr. DORSEN. That is very kind of you, sir. Thank you very much.

Mr. MOSS. I want to thank you, also. I know that the committee has gained a great deal from your opinions and the dialog we have had today.

The reservations in the record will be held. I hope that we can have the material supplied as promptly as possible.

Mr. DORSEN. Very promptly.

Mr. MOSS. With that, the committee will stand adjourned until——

Mr. SCHEUER. May I ask unanimous consent that if either of the two witnesses decide to amend or enlarge their remarks in any respect they may do so?

Mr. MOSS. Is there objection?

Hearing none, it is so ordered.

The committee will stand adjourned until tomorrow morning at 10 a.m., when we will hear from Prof. Philip B. Kurland, University of Chicago Law School.

Thank you very much.

[Whereupon, at 1:07 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Wednesday, October 22, 1975.]

60-044—75——8

CONTEMPT PROCEEDINGS AGAINST SECRETARY OF COMMERCE, ROGERS C. B. MORTON

WEDNESDAY, OCTOBER 22, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2123, Rayburn House Office Building, Hon. John E. Moss, chairman, presiding.

Mr. MOSS. The subcommittee will be in order.

Yesterday at the opening of the hearings I made certain remarks regarding the reasons for the session on legal issues involved in the refusal by the Secretary of Commerce to comply with the subpena duces tecum issued by this committee for information in connection with the operation of an Arab boycott in the United States. The remarks I made at that time apply here today.

Our witness for today, a very distinguished one, who will round out the opinions the committee has sought from recognized constitutional experts, is Professor Philip B. Kurland of the University of Chicago School of Law. His curriculum vitae has been made available to all members of the subcommittee. Otherwise let it suffice to say he has a long history of distinguished scholarship in the field of constitutional law and has written on executive privilege as well as the problems of the Congress in gaining information held by the Executive.

I wonder at this time if you would rise and be sworn.

Do you solemnly swear that the testimony you are about to give this subcommittee shall be the truth, the whole truth, and nothing but the truth so help you God?

Mr. KURLAND. I do.

Mr. MOSS. Will you please identify yourself for the record.

TESTIMONY OF PHILIP B. KURLAND, PROFESSOR OF LAW, UNIVERSITY OF CHICAGO SCHOOL OF LAW

Mr. KURLAND. Philip B. Kurland, professor of law at the University of Chicago.

Mr. MOSS. We welcome you and you may proceed at your own pace.

Mr. KURLAND. Thank you, Mr. Chairman.

Chairman Moss and members of the committee, I am happy to be here to testify, at the request of the subcommittee, on the question of the Department of Commerce's immunity from oversight by this

committee with reference to statements filed with the Department of Commerce by exporters to Arab countries.

I have read the hearings of September 22, 1975, at which Secretary Morton testified, and I have examined the Attorney General's Opinion of September 4, 1975. I should say at the outset that I am of the opinion that, as a matter of law, they are wrong in their claim for executive immunity from congressional oversight in this matter.

I have prepared a written statement which, I believe, has been distributed to the members of the subcommittee. I can proceed, as the chairman chooses, to read the statement and then submit to examination, or to submit to examination directly.

Mr. Moss. I think it might be beneficial to read the statement and perhaps discusss it. If you would like to have the statement included in the record at this point so that you have a greater latitude in discussion, the Chair would be pleased to ask unanimous consent that that be permitted.

Mr. KURLAND. I am perfectly prepared to read the statement and submit to questions during the course or after the statement.

Mr. Moss. Fine. Let us follow that format.

Mr. KURLAND. Thank you, Mr. Chairman.

I. BACKGROUND

The issues before this committee derive from the provisions of the Export Administration Act, which sets out at section 3(5), 50 U.S.C. App. section 2404(5), the policy of the United States as enacted by the Congress of the United States. Section 3(5) states:

> It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles (etc.) to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting such restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States.

The Department of Commerce, according to its own publications, agrees that—

> Virtually every transaction with most Arab countries will involve a boycott of Israel request at some state of the transaction. Such requests may take various forms . . . e.g., that the goods may not be of Israeli origin or the product of a boycotted firm, or that the bidder agrees to abide by the Country's boycott of Israel regulations. . . .

Memorandum of the United States Department of Commerce, the Assistant Secretary for Domestic and International Business, entitled, "Department Policy on Dissemination of Trade and Investment Opportunities Containing Restrictive Trade Practices," and signed by Travis E. Reed, Assistant Secretary for Domestic and International Business.

That memorandum states flatly, "The Department will continue to disseminate trade and investment opportunities from Arab countries, including those with boycott clauses." It purports to satisfy the policies announced in section 3(5) by a stamp affixed to such disseminations which informs the recipient that the American policy is against

supporting such boycott clauses, but that it is not illegal for any American firm to comply with such boycott demands. This stamp appears to be the extent of the total effort made by the Department of Commerce to secure compliance with American policy.

Parenthetically I should say I have been informed this morning that the statement about illegality of such performance has been removed at the direction of the Secretary of Commerce.

There is no question raised and none could be raised that this committee has the right and the duty to determine whether the administration of the law is in conformity with its objectives and to consider legislation that might be required to assure more realistic compliance with the statutory policy, if that should prove necessary. Tangentially to the immediate issues, the committee also has the duty to discover whether the Federal Trade Commission and the Securities and Exchange Commission are enforcing the antitrust and securities laws which might be violated by the boycotts in question here.

Pursuant to these rights and duties, this committee issued a demand to the Secretary of Commerce for the reports that are required by law to be made to the Department of Commerce by every international trader of any boycott request with that request, if any, by such American business firm, and it is that subpena which creates the issues with which we are dealing now.

II. SECRETARY MORTON'S PURPORTED RELIANCE ON THE ATTORNEY GENERAL'S OPINION OF SEPTEMBER 5, 1975

The chronology of events is of some importance to an understanding of the issues here, because, at the hearings of this committee on September 22, 1975, the Secretary of Commerce purported to rest his refusal to comply with the committee demands on an opinion of the Attorney General. At pages 14–15 of the transcript, Secretary Morton said: "The materials have not been provided because we have been given an opinion by the Attorney General not to make them available."

Of this statement, two observations should be made. First, the Opinion of the Attorney General did not tell the Secretary not to make them available. At most, the Opinion said that the Secretary need not make them available. And, it should be noted that, in fact, despite the Attorney General's Opinion, the Secretary has offered to make available a large portion of the data that the opinion says he need not make available.

Second, the Attorney General's Opinion is obviously an afterthought. We do not have here a Secretary acting on the advice of the Attorney General, we have rather a Secretary who has solicited a brief from his counsel in support of a position that he had long since taken without that counsel's advice. The chronology makes this clear.

The data was requested on July 10, 1975. On July 24, the Secretary of Commerce informed this committee that he would not supply the data because of the authority given him by the Congress to refuse to deliver such data. That authority purported to be section 7(c) of the statute, to which I shall direct my remarks shortly. Because of this refusal, on July 28, this committee issued a subpoena for the required data. On August 22, the Secretary again directed a letter to this com-

mittee saying that he would not comply with the subpoena. On that same day, i.e., after he had twice rejected the demands of this committee, he first addressed a request for an opinion of the Attorney General that the Secretary need not comply with the demand. The Attorney General's opinion in support of the Secretary's position was delivered on September 4. On September 22, the Secretary testified that his actions were taken at the direction of the Attorney General, which I submit could hardly have been the case.

III. THE VALIDITY OF THE ATTORNEY GENERAL'S OPINION OF SEPTEMBER 4, 1975

In any event, the status of an opinion of the Attorney General ought not to be misconstrued. Such opinion is advice given to a client and not, in any way, authoritative or binding on Congress or the courts. Mr. Justice Jackson, speaking of just such an opinion that he wrote as Attorney General, referred to it in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 649 N. 17 (1952), as "partisan advocacy." "Partisan advocacy" is exactly the proper label for the opinion in question here. It is a brief, not a judgment; it does not weigh arguments, it makes them.

Section 7(c), 50 U.S.C. App. Section 2406(c) of the act provides:

> No department, agency or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

It is from this section and this section alone that the Secretary and the Attorney General derive the proposition that the data demanded by this committee should not be supplied to it.

Both the Secretary and the Attorney General have eschewed reliance on so-called executive privilege, for good reasons. There isn't a semblance of evidence that any of the matters sought to be kept from Congress here involves either diplomatic or military secrets or confidential communications between Government officials.

Moreover, the concept of executive privilege is still in bad odor as a result of its persistent abuse by recent executive actions. But attempts to frustrate congressional inquiry into executive action smells the same whatever the title given to it.

A. The alleged presumption

The sole question at issue here, then, is what is the meaning and intent of Congress in the enactment of Section 7(c). The Secretary and the Attorney General would have you indulge a presumption that Congress intended that this section forestall the congressional oversight and legislative functions except with the permission of the Secretary of Commerce who is the very subject of the oversight investigation that is involved here. When it comes to evidence in support of such a presumption, however, there is nothing except the personal predilection of the Attorney General and his predecessors in their positions as advocates for the persons they are seeking to protect from congressional inquiry.

The heart of the Attorney General's opinion, and the language as reiterated by the Secretary at the September 22 hearings, is to be found in the words on page 4 thereof. "The foregoing opinions have proceeded under the general assumption—which I share—that statutory restrictions upon executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees."

However much one may admire the Attorney General—and I am one of those who certainly does—his personal or official predilections can hardly be taken to be those of the Congress. And it is the intent of the Congress that must be controlling in the interpretation of a statute. I find it difficult to accept the proposition that it should be presumed that Congress by its silence, intended to cut itself off from data appropriate and necessary to its oversight legislative functions, as I shall explain later.

The Attorney General calls his interpretation a "standard interpretation," but what makes it "standard" except his calling it such is not evident. It is not surprising that there is no authority cited in support of this "standard interpretation."

The Attorney General purports to rest his conclusion, in part, on the fact that Congress has written some statutes in which it specifically states that Congress is not included in the injunction of secrecy. He draws the conclusion that Congress' failure so to provide here indicates an intent to allow the Secretary to keep the data from Congress.

The Attorney General could, of course, have also cited legislation which specifically says that Congress is to be included among those whose access to data is prohibited. And from these he could draw the conclusion that the failure of the statute in question here specifically to include Congress among those who are barred means that there was no intention to bar Congress from the data.

The fact is that there are three kinds of statutes: One specifically says that Congress is not barred from access; a second specifically says that Congress is barred from access; and the third, on which the first two shed no light whatsoever, where Congress is silent. The third category is by far the largest and any "standard interpretation" that Congress intended to destroy its power of oversight each time by its silence would have very broad effects. If such a construction were to prevail, Congress would indeed be, like Milton's *Samson Agonistes*, "Eyless in Gaza, at the mill with the slaves."

B. The so-called legislative history

The Attorney General's contention that the legislative history of the statute supports his construction is also without foundation. He does not rely on any legislative history that occurred during the course of the passage of the 1969 law or its predecessor 1949 act. He purports to rely on the fact that in 1956 Senator McClellan proposed an amendment that would, in effect, have precluded the assertion of executive privilege by the Secretary of Commerce in regard to foreign trade with Russia. It had nothing to do with section 7(c), and the withdrawal of the amendment could not be construed as acquiescence by Congress in the Secretary of Commerce's interpretation of executive privilege. See Congressional Record for June 14, 1956, at p. 10405.

Two proposals for amendment of the act were made in 1962. Both were withdrawn by their sponsors without action taken either in committee or on the floor. Congressman Kitchin's was withdrawn, according to the Attorney General's opinion, after he was assured "that nothing in the present statutes would prohibit the Department from furnishing information obtained by it to a congressional committee." (P. 8.) Senator Keating's was withdrawn because the "issues required further study." (P. 9.)

Obviously there is nothing in the legislative history that has been offered that suggests support for the proposition that section 7(c) calls for the congressional surrender of its oversight authority, except at the discretion of the Secretary of Commerce, the position for which the Attorney General contends. Indeed, the withdrawal of Congressman Kitchin's amendment was based on representations that the data would be available to Congress.

C. The argument of administrative interpretation

Finally, the Attorney General rests on a reed no stronger than the others that he proferred. He says that there are cases which hold that a court in seeking congressional intent may give weight to administrative interpretation of an ambiguous provision. And clearly there are such cases. There are also cases refusing to give effect to administrative interpretation. There are none which say that in the event of a conflict between the Executive and the Congress it is the executive view of a statute that should be held controlling, which is the position for which the Attorney General is contending here.

There is another reason why the argument of administrative interpretation fails here. The argument rests on the existence of a longstanding, continuous, and uniform construction, preferably rendered in the context of adversary proceedings. There is no evidence of any such longstanding, continuous, and uniform construction in anything like adversary proceedings here. Certainly none was shown in the Attorney General's opinion.

Indeed, if we look only at the facts of the case before us, we see the ambivalent behavior of the Department of Commerce under section 7(c). For the Secretary is quite prepared, without any finding that revelation would not be contrary to the public interest, to submit almost all of the data contained in the confidential files requested. His reliance on section 7(c) is limited to the revelation of the names of the filing parties and the data that might identify those parties. Surely that is not consistent construction of section 7(c) that Congress may not have "confidential data" except on a finding by the Secretary that the revelation would not be contrary to the public interest. Certainly section 7(c) cannot be construed to mean that Congress may be denied access to data necessary for it to perform its constitutional duties of legislation and oversight at the mere whim of the Secretary. But that is the construction offered here by Secretary Morton.

If the failure or refusal by an executive agency to deliver data requested by the Congress were to constitute authoritative precedent for refusal to honor subsequent requests, then Congress has, indeed, already lost its oversight function. During the 93d Congress, the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary produced a partial catalogue of executive branch refusal to

deliver data in response to congressional inquiry. The committee print is entitled: "Refusals by the Executive Branch To Provide Information to the Congress 1964–73." The catalog is a large volume. It is 571 pages long. I assure you that it affords precedent for any refusal to comply with legislative inquiry. But I refuse to believe that past violations of law are authority for further violations.

IV. THE PROPER READING OF SECTION 7(C)

The legal argument in support of the Attorney General's conclusion can best be described as sophistical. The essential question to be answered remains that which the Attorney General stated at the outset of the opinion. Does the silence of the statute as to the accessibility of the data to Congress create a presumption that Congress was not to have access to the data? The Attorney General would indulge such a presumption, but solely on the basis that he and his predecessors, as counsel to the members of the executive branch, would prefer to exonerate their clients from congressional oversight.

I should think that the presumption would go in the opposite direction. My reasoning is syllogistic.

1. The major premise is that the congressional function of oversight and investigation is a power and duty of primary importance to our constitutional system of checks and balances. If judicial support for that proposition is necessary, it is available in abundance. For example, there is this language from the opinion of Mr. Chief Justice Warren, in *Quinn* v. *United States*, 349 U.S. 155, 160–61 (1955):

> There can be no doubt as to the power of Congress, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power, deeply rooted in American and English institutions, is indeed coextensive with the power to legislate. Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress would be seriously handicapped in its efforts to exercise its constitutional functions wisely and effectively.

The long history of congressional investigations was detailed in what remains the prime authority on this point, *McGrain* v. *Daugherty*, 273 U.S. 135, 160 et seq. (1927). See also the recently published five volumes on congressional investigations edited by Schlesinger and Bruns. *Congress Investigates: A Documented History 1792–1974* (Chelsea House-Bowker, 1975).

2. My second proposition is that a legislature is not deemed to surrender its power in the absence of what the Supreme Court has called "clear and unmistakable evidence of the intent to part with it." *Rochester Ry Co.* v. *City of Rochester*, 251 U.S. 236, 248 (1907). In another case, the court said:

> An alleged surrender of suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions.

Wheeling & B. Bridge Co. v. *Wheeling Bridge Co.*, 138 U.S. 287, 293 (1891). It was Chief Justice Taney who put the proposition in these words:

> Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the government of power which has been confided to

it for the general good—unless plain and express words indicated that such was the intention of the Legislature.

Brown v. *Buchesne*, 19 How. 183, 195 (1857).

I should think, however, that one need not resort to judicial authority but only to commonsense, which is perhaps in shorter supply, to support the presumption that Congress is not to be deemed to surrender its authority to oversee the functioning of the Department of Commerce itself, or that it be exercised solely at the discretion of the Secretary of Commerce.

3. The conclusion that follows from these premises is that section 7(c), which is totally silent on the surrender of the congressional investigatory power, cannot be utilized to support the failure of Secretary Morton to surrender to this subcommittee the documents subpenaed from him.

I would make one more point, before ending, because the issue was raised, if tangentially, in the September 22 hearings of this subcommittee. That point is that the Secretary of Commerce's reliance on the Attorney General is not exonerative of his contempt of Congress. Here I would refer you to a judgment of the Supreme Court in *Sinclair* v. *United States*, 279 U.S. 263, 299 (1929):

There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliberate. The facts sought were pertinent as a matter of law, and Section 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of the law is no defense.

Thus, Secretary Morton cannot be exonerated from his duty to comply on the ground that he was following counsel's advice where, as here, that advice was invalid as a matter of law.

Allow me to say, in conclusion, that the immediate issue before this subcommittee, the duty of the Secretary of Commerce to submit the documents that the subcommittee has subpenaed, is of great importance in itself. It is even more important, however, in the context of recent migrations of constitutional power from the Congress to the executive branch of the Government. Senator Ervin, in his foreword to the document to which I have already referred: Refusals by the Executive Branch To Provide Information to the Congress, wrote these words, which I commend to you as wisdom based on experience and the old-fashioned concept of the Constitution that made Congress the first branch of Government. He said:

The power of Congress, under our Constitution, to inquire never has been seriously in question. To the extent that Congress has acceded to executive branch denials or the withholding of information, it has failed to enforce its authority and has vacated its power to inquire. The diversity of a legislative body, which is its very nature, easily permits incidents to become obscured. When one subcommittee or another is frustrated in its efforts to obtain essential data, the facts surrounding the rebuff often escape attention or seem too insignificant in the single instance to warrant vociferous action. It is these individual instances in which Congress is denied information, when regarded collectively, that contribute to the deterioration of the constitutional authority of Congress.

I urge this subcommittee not to contribute to the continued destruction of congressional authority. The constitutional plan of checks and

balances, an essential safeguard for American liberties, is constantly endangered by failure of Congress to assert its authority vis-a-vis the Executive. I trust that this case will not prove another instance of such surrender; the rights at stake are not those of individual Congressmen, they are the rights of the American people whose representatives you are.

Thank you, Mr. Chairman.

Mr. MOSS. Thank you, Professor Kurland.

I want to give you this assurance that I as chairman of this subcommittee intend to pursue this matter just as far as I have the votes to support me.

Mr. KURLAND. I hope you will, sir.

Mr. MOSS. Because I also regard it as a most vital constitutional question. When the privileges of the House are involved I have no partisan politics.

The Chair at this time reserves his time and recognizes the gentleman from Texas, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Professor Kurland, I am not a lawyer, I am strictly a layman. This is a very definite legal question and even a constitutional question which is probably the most technical of all law. But let me see how you understand the basic facts. As I understand it, in law we use the term "depends on this case," every situation is completely different. In other words, we just don't draw a broad principle that applies to everything, do we?

Mr. KURLAND. You are calling on my weakest capacity as a pedagogue because the answer has to be yes and no, as usual. The function of the Congress, which is also a body which is charged with obedience to the Constitution, is to lay down general rules applicable to everybody. The function of the courts is to decide particular cases. In the course of deciding those cases it will expound principles and reasons why the conclusion is reached. Presumably those principles and reasons will be equally appliable to later cases whose facts require the application of those rules or principles. While it is true that the court's act on a case-by-case basis, they purportedly act on principles which transcend the immediate cases they are deciding.

Mr. COLLINS. That is a good answer. That broadens my viewpoint

Let me take it from here. When we draw up a law we are in a sense rather broad, in our terminology, but as I understand this situation, the law that applies states that the Secretary shall make the decision based on his determination as to national interest. Is that your understanding of the law?

Mr. KURLAND. I will have to ask what decisions, Mr. Collins?

Mr. COLLINS. As to whether to turn over the information is the decision.

Mr. KURLAND. Whether to turn over the information to the Congress?

Mr. COLLINS. To turn over information which has been secured by him. His decision is whether to turn over information which was secured by his Department from others.

Mr. KURLAND. I do not read the statute as saying that it is his decision as to whether to turn over the information to Congress. It is quite

true that I would read the statute that he has to make the decision as to whether the materials are going to be made available for publication and dissemination. My proposition is really a fairly simple one, that the limitation on publication is not, and is presumed not to be, applicable to congressional requests for information.

Mr. COLLINS. In other words, you determine that the line here, which is the key sentence in the act, "shall publish or disclose information obtained hereunder," does not apply to Congress?

Mr. KURLAND. That is correct.

Mr. COLLINS. Why do you say that?

Mr. KURLAND. Because the function of privacy with regard to data collected and with reference to competitors and others is the purpose of the rule, and the Congress, because of its constitutional obligations is to be presumed not to have been cut off from its constitutional functions unless it has specifically surrendered those functions.

Mr. Levi, I should point out, does not say that this law says that Congress shall be cut off. He says that is the question, and he is willing to raise a presumption that it means Congress as well as the others. I am saying that it does not raise such a presumption.

Mr. COLLINS. Let me take the next phase of this which is whether he is responsible for turning it over or whether he shall withhold it. He says withholding thereof is contrary to the national interest.

Now, the subject matter that they are seeking to decide in this committee in regard to boycotting is determining whether information on boycotting is to our national interest. Only one time do I know that the United Nations has taken a specific stand on boycotting. The United Nations favored a boycott and voted a boycott on its own. In our country, we have not only recognized boycotting, but this session of Congress passed a law legislating and mandating that secondary boycotts were permissible. With boycotts being recognized nationally and internationally, why is it to our national interest to get involved in providing information to this committee?

Mr. MOSS. Again the Chair points out he has requested from the legal scholars who have agreed to prepare briefs that they address themselves only to the legal questions involved. The policy questions on boycott remains a congressional matter for resolution. It is not an issue with the present controversy surrounding the failure of the Secretary to respond to a subpena duces tecum issued by this committee.

Mr. COLLINS. Let me follow up what the chairman said. Does the subject matter on which the Secretary is required to furnish information have any essence to the answer or not, or does he have to furnish it regardless of what the subject matter is?

Mr. KURLAND. I speak to the proposition with regard to the publication and dissemination of this matter to others than those who are pursuing their constitutional functions. I would expect, for example, that if the Department of Justice was seeking the information in order to discover whether the behavior within the Department of Commerce was proper, there would be no suggestions that this language was intended to cut the Department of Justice off from that data; or if the grand jury was seeking data on this ground, I would submit there is no basis for precluding grand jury access, and Congress' function, in its investigative capacity here, I would submit has equal rights under the same statute.

Mr. COLLINS. You are saying that if you went to the Justice Department, they would have the right because of the nature of the subject matter that they were requesting.

Mr. KURLAND. They would have the right because they are like the Congress, I take it, charged with investigating defalcations by executive officials.

Mr. COLLINS. But they can't investigate without cause.

Mr. KURLAND. Who makes the determination of cause?

Mr. COLLINS. The subject matter does.

Mr. KURLAND. I don't see how the subject matter does, Mr. Collins.

Mr. WAXMAN. Would the gentleman yield?

Mr. COLLINS. I yield.

Mr. WAXMAN. The gentleman's line of questions seems to indicate there is some question open as to our policy against boycotts in light of international boycotts and labor union restrictions, but let me refer the gentleman to the language of the Export Administration Act, where it says:

> It is the policy of the U.S. to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, hence to encourage or request manufacturers or concerns in export of articles to refuse to take any action including furnishing of information which has the effect of furthering or supporting such restrictive practices of boycotts fostered or imposed by any boycotting country friendly to the United States.

The President of the United States has made it clear that it is the policy of this country to oppose these kinds of boycotts. Secretary Morton made it clear to us that he believes that the policy to oppose boycotts is not in dispute.

On the form itself furnished to the businesses that are requested to file this information, not requested I should say by law, mandated to file this information, it says, "It is the policy of the United States to oppose restrictive trade practices or boycotts."

Mr. MOSS. We are dealing with a very narrow issue. The issue is the legal authority of this committee as opposed to the asserted authority of the Secretary of Commerce. Is the Congress barred from inquiry because of the Secretary's interpretation of a provision of the statute? That is really a very narrow but an extremely significant issue. We should not try to get into the policy questions which, while interesting are not relevant to this inquiry at this point. They were as we started the inquiry because we started to inquire into boycotts in this instance and their effect upon the securities of publicly held corporations, the possible effect on trade practices. But we have been taken off that course by the refusal of the Secretary of Commerce to respond to the subpena ducas tecum duly issued under the authority of the House of Representatives.

Mr. WAXMAN. If the gentleman will yield further, I think the chairman's point is correct as stated, that the policy question is not under discussion, only the legal question before us of the Secretary's refusal to give us information. I think it ought to be settled—and not be left in question—that the policy question is not even in dispute. No one is questioning whether the policy of that law which says we are trying to discourage these kinds of boycotts is very clear, and supported by the administration and supported by the Congress. I would not want to have the public receive any inference that that question is still left open.

Mr. COLLINS. You are a constitutional lawyer, Mr. Kurland, and the chairman is defining very well what we have. As a constitutional question, does Congress have the right to demand under this law, without showing cause, any information that any Secretary has?

Mr. KURLAND. Let me first say that I don't think it is a constitutional question and I don't think it is a constitutional question because the Attorney General did not raise a constitutional defense. The only defense which is raised here is under section 7 of the statute. Under section 7 of the statute, I don't have any doubt that so long as the subject matter is within the competence of this committee, and I have no doubt that the subject matter here is in the competence of this committee, that the committee has the power to secure this data. There might be defenses which have not been asserted, constitutional defenses, like the privilege against self-incrimination but that is not, I take it, in issue here.

Mr. COLLINS. Those who turned over this material to the Commerce Department realized that the Department had a long history of keeping this material confidential. Now, what is the Secretary of Commerce's legal obligation to those who turned over this material to him and believed it would be kept confidential? What is his responsibility to the parties who turned it over to him?

Mr. KURLAND. His responsibility is to conform to the laws of the United States and the Constitution of the United States which requires him to turn that data over to Congress when it properly seeks it.

Mr. COLLINS. In this case or in any case, as you see it, is it really this broad, in any case a committee of Congress has the right, if it was within the jurisdiction of that committee, to ask for any information that they have regardless of how they secured the information.

Mr. KURLAND. Yes, so long as it is within the jurisdiction of the committee and so long as there is no constitutional barrier to the provision of the information such as the privilege against self-incrimination. There is one other possibility. The Congress has undertaken from time to time as regards income tax returns to cut itself off from access.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. MOSS. The Chair reserved his time. I would like to raise another question with you. Referring to the grand jury, this body itself has been called the grand inquest of the Nation. It derives from the English House of Commons which was really a grand jury, in a sense a national grand jury, before it became a clear giver of laws. Is that true?

Mr. KURLAND. Yes, sir.

Mr. MOSS. That is the antecedent of this House.

Now, in the case before us, the material sought is material which is required by law, the law being the regulations, to be submitted by any firm that engages in this kind of trade where a boycott provision is required as part of their agreement. So, it is not discretionary with the firms whether or not they supply the material to the Secretary; they must submit it to the Secretary.

Mr. KURLAND. That is right, sir.

Mr. MOSS. So, we are not dealing with matters which are voluntarily submitted under an agreement that it will be privileged and kept from anyone.

Mr. KURLAND. It is not subject to negotiation.

Mr. MOSS. Now, there has been no raising of the question of jurisdiction of this committee by anyone. We have clear jurisdiction under the rules of the House of Representatives over two very important agencies directly involved in the trade practices and in the marketing of securities of publicly held corporations in the United States. It is necessary, if we are to make an evaluation of the impact of any kind of boycott, to know who is being boycotted. Isn't that correct?

Mr. KURLAND. I certainly think that comes within the area of relavant inquiry.

Mr. MOSS. Now, if we were, even for the moment, to stipulate that this might be inferred from the enactment of the section 7, wasn't that pretty well removed, not by an inference but rather explicitly, in the section 552 of title V?

Mr. KURLAND. I should think the answer to that is clearly yes. I assume that Professor Berger made that point sufficiently so that I need not repeat it.

Mr. MOSS. But I think it well to review it because in subsection 3 we have: "This section does not apply to matters that are," and it lists several and subsection 3 is specifically exempted from disclosure by statute. This kind of exemption, section (c), then follows. This section does not authorize the withholding of information or limit the availability of records to the public except as specifically stated in this section. This section is not authority to withhold information from Congress. These exemptions do not constitute the authority to withhold from the Congress. Now, that was the later enactment, was it not?

Mr. KURLAND. Yes; it was.

Mr. MOSS. Therefore, any fair reading of the law would say that that is the law at this moment, the statutory law.

Mr. KURLAND. I should say yes. I would repeat that I do not need to rely on the Freedom of Information Act to reach the conclusion which I have reached with regard to section 7.

Mr. MOSS. I quite agree. I am not, as my distinguished ranking minority member, a lawyer. But I spent 11 years writing the Freedom of Information Act where we went over many, many cases comparable to this, many assertions of authority in the executive branches and departments.

Mr. KURLAND. I don't think the intention of Congress is shadowed in any way whatsoever.

Mr. MOSS. Really what we are faced with is, Is Congress going to continue to assert its role as the prime representatives of the people and insist upon being fully equal, at least, if not the dominant partner in Government?

Mr. KURLAND. I hope you assert that constitutional obligation.

Mr. MOSS. I thank you.

Mr. Ottinger.

Mr. OTTINGER. Thank you, Mr. Chairman.

I have no questions. I think it is the most lucid, clear, best testimony I have heard in my 7 years in Congress. I want to congratulate you. I hope we get you to Harvard Law School.

Mr. KURLAND. You are very kind.

Mr. MOSS. Mr. Scheuer.

Mr. SCHEUER. I, too, with to congratulate Professor Kurland on some very excellent testimony.

We did hear from a Harvard law professor yesterday. It would be difficult to tell who is primus inter pares of the three very distinguished witnesses we have heard.

On the penultimate line of page 13 you say that you "refuse to believe that past violations of law are authority to further violations." Now, are you saying there that the authority for our right to information from the executive branch rests on a statutory base?

Mr. KURLAND. No, Mr. Scheuer.

Mr. SCHEUER. I understood that the base was constitutional and that whatever past violations there were, on the numerous occasions when the executive branch has failed to give us information we have requested, were violations of their constitutional obligation to provide this information and not violations of statutes.

Mr. KURLAND. I would say that your right to investigate and secure data is a part of your constitutional authority and duty and the failure to comply would be a constitutional violation.

At this point I expect I was really trying to state, less cogently than Senator Ervin used to, that you cannot say that because past misdeeds have occurred, current misdeeds are made valid. He used to say that murder has been with us for a long time and still is not legal because of these past activities.

Mr. SCHEUER. Another question comes to mind based on the question of my distinguished minority colleague. Are there any circumstances under which it would be either illegal, unfair, or improper for us to get information from the executive branch, regardless of the conditions under which that information was proferred to the Government by private individuals? During the hearings we had on September 22, we pressed the Secretary to require firms that have filed in the past that they have been approached by the Arabs to divulge whether or not they intend to acquiesce to the Arab boycott. As a result of this pressure, Secretary Morton notified us three days later that he was changing his policy, and he enclosed a form, revised to require the corporations and individuals who have been approached by the Arabs not only to indicate that they have been approached but also to indicate whether they intended to comply.

Since then I have written him urging that he require firms that have filed over the past decade, to refile on his new form and indicate whether or not they have been cooperating with the Arab boycott.

Now, these are firms that have filed in the past under the cloak of secrecy. If the Secretary goes ahead and requires these firms to refile and to answer the questions under section 10—before on the form it was made voluntarily but that statement has been removed from the new form—and if they now answer on the new form, in order to eliminate any question of equity on their part in relying on the representation of privacy, do you think it would make our constitutional case clearer and less subject to any attack if we directed the Secretary, assuming that he does require these companies to refile, to inform them that whatever cloak of secrecy may have been made available in the past, will no longer be true in the future, and that it may be that Congress will exercise its constitutional prerogatives to request that information?

Mr. KURLAND. I must say, Congressman, that I do not believe that securing the prior data on representation of confidentiality was a

representation of confidentiality as to congressional utilization, but even if it were, I don't think that that is a bar to your access to the materials. You do not improve your legal position by having this information conveyed to those who were asked to supply data. Whether it improves the moral position of the Secretary of Commerce I would be prepared to leave to him to decide.

Mr. MOSS. Will the gentleman from New York yield?

Mr. SCHEUER. Of course.

Mr. MOSS. Isn't it true that this committee can, if it chooses, require all of these firms to supply the material directly to the committee?

Mr. KURLAND. I certainly know of no barrier to access by the committee.

Mr. MOSS. It would be costly duplication to the taxpayer but it is clearly within the powers of the committee to require each of the firms— I think there are some 30,000 on the mailing list of the Secretary of Commerce—to supply in detail from experience over a period of years in response to the needs of the committee.

Mr. KURLAND. In addition, you could require officials to come here and testify under the subpena duces tecum. I have no question about the committee's authority in that regard.

Mr. MOSS. I thank the gentleman for yielding.

Mr. SCHEUER. I thank the witness.

I have no further questions. We had prepared some questions to ask you but when we read your testimony they were answered neatly, skillfully and eloquently. I congratulate the witness for his brilliant testimony.

Mr. KURLAND. Thank you, Mr. Congressman.

Mr. MOSS. Mr. Waxman.

Mr WAXMAN. Thank you, Mr. Chairman.

Mr. Kurland, I want to join my colleagues in commending you for your testimony. It is quite clear, lucid, and convincing.

I was interested in a new issue you raised and that is the issue of the Attorney General's role in our consideration of this legal question. You raised it in two aspects. One, the purported reliance by the Secretary on the Attorney General's opinion and, second, you raised the issue whether the Secretary's reliance on the Attorney General's opinion, legal counsel's opinion, exonerates him in any way from possible contempt. Why did you raise those issues? They did not seem to be raised by the Secretary except in passing. Why did you feel it important to bring it to our attention?

Mr. KURLAND. It seemed to me that the very logical next step that this committee is committed to, as I read the September 22 hearings, was the process of a contempt citation being brought against the Secretary. It seemed equally clear to me on the basis of the Secretary's testimony that he purported to find absolution, if you will, in the fact that the Attorney General had provided him with an opinion saying that he did not have to provide those documents. So I thought it appropriate in light of the issues which were raised here, in light of the issues which were raised at the hearing, to respond to what I thought were implicit, indeed, I thought explicit, questions earlier raised.

Mr. WAXMAN. Whether the Secretary in fact relied on the Attorney General's opinion or not in making his decision not to turn over that

information is really sort of peripheral to the question of whether we have the right to that information, is it not?

Mr. KURLAND. I would agree with the conclusion you reach. I would not agree that that was the position taken by the Secretary. As I read his position he thought he was firmly grounded on the opinion of the Attorney General and that it was a shield against the demands of the committee he was proposing. I addressed myself to the question whether there was such a shield and I find the answer is that there is not.

Mr. WAXMAN. It raises an interesting question about the role of the Attorney General. You seem to indicate in your presentation that the Attorney General is nothing more than legal counsel for the Secretary. Isn't the Attorney General in fact our lawyer, also, and what role should we expect from the Attorney General when we have a legislative versus executive dispute?

Mr. KURLAND. I turned around because sitting behind me are staff members of the Senate Subcommittee on Separation of Powers of the Senate Judiciary Committee who are about to hold hearings on the question of the difficulty of having Congress being represented by the Attorney General at the same time that the Attorney General is representing an executive interest in conflict with Congress.

I would like to give you a quick answer to your question but I think I would prefer to await the outcome of those hearings before I do.

Mr. WAXMAN. Lastly, a question that is not related to the others I have asked you. If the Secretary were to turn over this information to us and we wanted to make it public, is there any restriction against Congress making that information public?

Mr. KURLAND. No; I think that would rest in your discretion.

Mr. WAXMAN. Even though the act itself says that this is not to be made public unless it is in the national interest to be disclosed and that decision is left to the Secretary?

Mr. KURLAND. In terms of the Secretary's discretion to make it public the statute imposes certain conditions. I see no such conditions so far as Congress is concerned. We are not dealing here with, as I suggested earlier, diplomatic secrets or military secrets. I could advise you as to how I think your discretion should be exercised but I don't see any legal compulsion as to how discretion should be exercised.

Mr. WAXMAN. Is there any problem with a subcommittee of Congress revealing the information which the whole Congress determines should not be made public except within the discretion of the Secretary?

Mr. KURLAND. I think it is too late at this time in our history to suggest that because there is some limitation on executive publication that there follows from this limitations on public——

Mr. MOSS. If the gentleman from California will yield, again this is a question which has to be ruled on by the chairman if presented to the committee. In the absence of the rule of the House barring the committee from disclosing information the Chair would feel that the committee would exercise its discretion. It would do so responsibly but the final judgment would be vested in the committee.

Mr. WAXMAN. Thank you, Mr. Chairman.

I asked the question more out of academic interest. I don't think it is an essential question to the issue of whether the Secretary is in contempt of this committee. I do believe he is in contempt and I agree with the gentleman's presentation to us.

Mr. SCHEUER. Will the gentleman yield for one brief question?

Mr. WAXMAN. Yes.

Mr. SCHEUER. Just to give you the final question as I see it there, if the Secretary turned over the information that we have asked for to us with a condition that it not be released to the public would we, in accepting that information, be bound by that condition, or would we be required, perforce, to refuse to accept it under that condition?

Mr. MOSS. If the gentleman will yield to the Chair again.

Mr. SCHEUER. Of course.

Mr. MOSS. The Chair will under no circumstances accept the material with any condition attached. He does not recognize the right of the Executive to spoon-feed the Congress, nor has he ever during his 23 years of service in this body under five Presidents of the United States.

Mr. WAXMAN. Mr. Kurland, let me ask the question so that it can be on the record and answered. If the Secretary were to maintain, and he has not maintained this point, that he would not give us the information (1) because of the discretion invested in him whether it should be made public, and (2) because he was concerned that the Congress would make it public, would you see that this argument would justify his not giving us this information?

Mr. KURLAND. I see no basis in law for providing an exemption from this obligation to observe the Subpena for the reason you just stated.

Mr. WAXMAN. Thank you.

Mr. MOSS. The gentleman from Nevada, Mr. Santini.

Mr. SANTINI. Thank you, Mr. Chairman.

Professor Kurland, I wish I could join in the accolades. Regretfully conflicts in time and other committee responsibilities prevented my hearing all of your testimony but knowing the wisdom and profound judgment of the other members of the committee I am sure the accolades are well founded.

I know I may be repeating some ground but I would like to quickly review with you—first of all, is there anything in the legislative history of 7(c) bearing on this issue of executive privilege that would in any way reinforce the Attorney's General's interesting opinion?

Mr. KURLAND. I think I have examined in my prepared statement all of the legislative history on which the Attorney General purports to rely. There is nothing in there to support the conclusion that he reaches.

Mr. SANTINI. Is there any evidence of legislative intent that bears on this issue?

Mr. KURLAND. None.

Mr. SANTINI. Do we have by way of direct case precedent or by way of parallel case precedent any decisions that would either support or refute the basic conclusion contained in the Attorney General's opinion to the Secretary?

Mr. KURLAND. Conflicts between the Congress and the executive branch as to the meaning of legislation have not come before the courts directly. Those conflicts have been resolved by the respective capacities of these two branches to impose their respective wills. What I suggested, however, is that there is in the report a syllogistic argument which is derived from case law.

First, that the legislative and investigative duties of Congress are constitutional obligations and constitutional powers.

Second, that there are cases which suggest that there shall be no inference of a surrender of a governmental power from mere silence.

Third, that we have in the statute no basis for the Attorney General's conclusion only that silence.

Therefore, I conclude that the legal position, if one can derive one from the cases at all, is that Congress has this power and it has not been surrendered by the language of section 7(c).

Mr. SANTINI. Next, and again please excuse my retreading old ground, it seems that the Attorney General's opinion in this context is nothing more than affable advice to a colleague. In this situation, however, does it purge the Secretary of any implications of contempt because after the fact he acts upon that?

Mr. KURLAND. No. I did find a direct judicial precedent on that score in the *Sinclair* case—and that is what Congressman Waxman was asking about a little bit earlier—which says that reliance on an attorney's opinion as to the law when that opinion is erroneous does not exonerate the client from the obligation to comply with the law.

Mr. SANTINI. Can the Secretary draw any legal substenance from the general proposition of law which recognizes that where there is no direct statute or case precedent bearing on the issue, the Attorney General's opinion or opinion of a legal adviser of the State or governmental entity will be considered binding?

Mr. KURLAND. I don't think so. I think the doctrine in the courts is fairly clear in this regard that in terms of legal interpretation of a statute the administrator charged with the application of that statute would have his views carry weight if he has a long, continuous, uniform construction of the act, preferably established in adversary proceedings.

We have no long, continuous, construction of the act by an administrator here, certainly not in adversary proceedings.

The doctrine which the Attorney General relied on and which you referred to, moreover, is a doctrine applicable to a contest between the contention of a regulated industry or person and a regulating commission in terms of the interpretation of the law. I know of no case which would suggest that there is a conflict between the reading of the statute by Congress and the reading of a statute by an administrator, the administrator's reading should be given priority.

Mr. SANTINI. Thank you very much, Mr. Kurland. We may be calling on your expertise and advice in terms of implementing the provisions of contempt.

Mr. KURLAND. I shall be glad to be of such help as I can in any way.

Mr. MOSS. The Chair now recognizes Mr. Wunder, the minority counsel.

Mr. WUNDER. Thank you, Mr. Chairman.

Professor Kurland, are you suggesting that attempts to amend the statute in question constitutes no legislative history?

Mr. KURLAND. Certainly attempts to amend, where the purpose of the amendment is clear and where Congress has really rejected the effectuation of that purpose, would have a bearing on the reading of the statute. You don't find any such legislative history here.

Mr. WUNDER. The attempts to amend the statute which were introduced and were withdrawn, in your opinion, constitute no legislative history?

Mr. KURLAND. I don't mean to tell Congress what its behavior means. It knows better than I do. I would suggest to you that there may be instances in which on the floor an amendment is proposed and rejected on the ground that a certain established reading of the statute is to be continued would be meaningful legislative history. It does not mean that anytime an amendment is proposed and rejected that one is going to read meaning into the further construction of that statute. It is particularly true here where one amendment was proposed with regard to executive privilege which I submit is not an issue here. one amendment was proposed and withdrawn on the ground that there is no basis—rather that the Commerce Department would provide such data and, therefore, the amendment was not necessary, and the third was withdrawn for purposes of carrying on investigations into what the issues and facts were.

I would respectfully submit that none of that legislative history can be read into this statute as meaning what the Attorney General suggests it means.

Mr. WUNDER. Why is the Attorney General's opinion in this case partisan advocacy?

Mr. KURLAND. I would suggest the Attorney General's opinions in every case are partisan advocacy. That is his function, his role, and that is what has been described as his function and his role. I would regard it, as did a most illustrious predecessor of the present Attorney General, Mr. Justice Robert Jackson, not once but many times, it is quite clear that the Attorney General is not offering advice to Congress, that is not his function, it is not his authority. It is quite clear that the Secretary of Commerce is his client. It is quite clear he wrote a brief on behalf of his client which is what was requested by his client.

Mr. WUNDER. Did he write a brief for his client or did he give his client a legal opinion and give his client the best advice available?

Mr. KURLAND. When you give your client advice solely on the basis of facts and law on one side of the question and totally ignore all contrary data and evidence, I am suggesting you are writing a brief and not an opinion, yes.

Mr. WUNDER. On page 12 of your statement you talk about the Secretary and his willingness to turn over some data to the subcommittee. You indicate that he made no finding with regard to the public interest. How do you know that he made no finding?

Mr. KURLAND. I have seen no evidence of such a finding. I saw the offering in the testimony of the Secretary. If he made a finding it was certainly sub silentio. That is why I say there was no finding.

Mr. WUNDER. It does not have to be a public finding. It could be sub silentio, could it not? It is his discretion.

Mr. KURLAND. I assume it could be. I assume he would also be subject to inquiry as to what the basis for drawing the line was if he made the finding in the one case and not in the other.

Mr. WUNDER. Thank you, Mr. Chairman.

Mr. SCHEUER [presiding]. Mr. Lemov, the majority counsel.

Mr. LEMOV. Mr. Chairman, I have one or two questions.

Professor Kurland, referring to the Attorney General's opinion, at page 6 the Attorney General goes into this question of legislative history which minority counsel raised.

First, he discusses Senator McClellan's amendment of 1956 which would expressly require compliance with the demand of a congressional committee. Then he describes the reasons ostensibly for the withdrawal of that amendment, and that is on page 7 where he says that the inclusion of such provision was said to have been inappropriate.

I would like to call your attention to the excellent legislative history to that colloquy on the floor of the Senate in 1956, and point out that immediately subsequent to that statement "inappropriate" there is the following additional statement quoted by Professor Berger yesterday:

> The committee, of course, wanted to make it clear that the omission of amendment from the bill as reported was not intended as any indication whatever of the committee's view on the subject of the amendment.

The statement continues in that vein. That was not included in the Attorney General's opinion. No reference to that additional colloquy.

What is your view on the relevance of that and the omission from the Attorney General's opinion of that?

Mr. KURLAND. I go back to the proposition I stated in response to Mr. Wunder. The opinion contains only data on one side of the issue, and data which weighted on the other side is not included, not only there but anywhere in the opinion.

Mr. LEMOV. Then on the question of the legislative history in the original 1949 act and the 1969 act, again on page 6 of the Attorney General's opinion, there is a statement, "The legislative history sheds no real light on the present issue." Then there is a footnote which refers to some language which is as follows in the Senate report referred to: "The prohibition against the disclosure of confidential information is one of several safeguards against administratice misuse of the statute's enforcement powers."

Would you have any comment on this limited legislative history and the use of the words "administrative misuse"?

Mr. KURLAND. I think there is no shirking the fact that section 7 was directed to a limitation on the behavior of the Secretary of Commerce and that is what fear of "administrative misuse" refers to here, that he would be making public, disclosing to competitors, data which Congress would prefer that he keep confidential.

Mr. LEMOV. Section 7(c) was the same in the 1949 act as it is now?

Mr. KURLAND. I can't tell you that I made a comparison of the language word for word, but there can be no doubt the purpose was the same.

Mr. LEMOV. So if the draftsman had been thinking about congressional use of the information, it is at least arguable, is it not, that

the words "congressional misuse" might have been added after "administrative misuse"?

Mr. KURLAND. I don't think there is any question that section 7(c) was not directed to cutting off congressional right of access to the data. There is no hint in the legislative history that that could be the intent.

Mr. LEMOV. One further question, Professor Kurland.

It has been suggested that some persons might have submitted these reports on boycott requests to the Secretary in reliance on an understanding that they would be kept secret. I would just like to ask for your comment on the language of section 7(c), particularly the phrase beginning "Unless," on the reasonable belief of a person submitting information to the Secretary.

Mr. KURLAND. There isn't any doubt that the person submitting such data to the Secretary of Commerce knows that under the act the Secretary of Commerce has the power to make a decision to release the data. That, as you say, is in haec verba, section 7(c). He cannot be misled in the belief that the Secretary would not reveal these data under this circumstance.

Mr. LEMOV. Furthermore, the standard by which the Secretary could make the finding is not a specifically enumerated kind of standard where the person submitting might know specific guidelines; it is a very broad standard, is it not?

Mr. KURLAND. It is a broad standard and also evokes my admiration for Congress' capacity to use convoluted words to say what it might say more directly.

Mr. LEMOV. Do you think the reasonable——

Mr. KURLAND. I do not know whether you have double negatives or quadruple negatives in that phrase.

Mr. LEMOV. Do you think it reasonable that a person who submitted data might have relied on that section as giving an absolute right to secrecy?

Mr. KURLAND. First, he could not rely on its being an absolute right to secrecy because the Secretary of Commerce is specifically given authority to publish when he makes that finding. There isn't any suggestion that the Secretary has the right to keep these data from Congress. It is a conditional secrecy at best.

Mr. LEMOV. Thank you, Professor.

Mr. MOSS. Professor Kurland, we are very much indebted to you for your cooperation. I know that the opinion is helpful to the committee.

The Chair has some instructions now that he wants to give on this record. The opinions we have received together with the transcript of yesterday and today will be directed to the attention of the Attorney General of the United States and to the Secretary of Commerce as promptly as the transcript is corrected.

There will be an appropriate cover letter inviting their careful consideration of the points raised in those opinions and in the dialog that has taken place.

At an early date, the Secretary, who continues under the subpena duces tecum, will be recalled before the subcommittee and be given at that time every opportunity to cure himself of the contempt which in the opinion of the Chair he has committed against the Congress.

Failing that, of course, the committee will have no alternative but to move to cite the Secretary for contempt of Congress and to urge that the House of Representatives affirm that citation.

The Chair has a request with unanimous consent that Prof. Burke Marshall of Yale University be permitted to submit a statement for the record.

Is there any objection?

Hearing none, the record will be held at this point to receive that statement.

[The following letter from Prof. Burke Marshall was received for the record:]

YALE LAW SCHOOL,
New Haven, Conn., November 12, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter relates to the hearings your committee has held concerning the effect of the confidentiality requirement of Section 7(c) of the Export Administration Act of 1969, 50 U.S.C.A. 2406(c). In that connection I have examined the letters of July 24 and August 22, 1975 from Secretary Morton to you and Congressman Staggers, the opinion letter of Attorney General Levi to Secretary Morton dated September 4, 1975, and related materials. My conclusion is that the language and legislative history of Section 7(c) do not justify the construction placed on it by the Secretary and the Attorney General that Congress intended the section to limit its own right to information filed with the Department of Commerce under § 4(b) of the Act, 50 U.S.C.A. 2403(b).

Certainly the words of Section 7(c) do not warrant such a construction. They prohibit any department or official exercising any functions under the Act (not just the Secretary of Commerce) from publishing or disclosing information obtained under it "unless the head of such department . . . determines that the withholding thereof is contrary to the national interest." It requires an extraordinary construction of legislative intent to conclude that Congress meant to let such a negative decision by executive branch officials preclude properly authorized committees of Congress, entrusted with the critical constitution of function of oversight, from obtaining information that they decided was necessary to the exercise of that function. It would make more sense of the language to assume that Congress acted on the belief that the withholding of such information from it is always contrary to the national interest, at least in the absence of a specific determination that public disclosure of particular information would harm some specific national (as against private) concern, and therefore did not intend the restriction of Section 7(c) to apply its requests and subpoenas at all.

Nor does it seem to me that the legislative history of the 1956 and 1962 extensions of the Export Control Act of 1949, 63 Stat. 7, to which the Attorney General's opinion refers, is inconsistent with this natural interpretation of the words used in Section 7(c). The 1956 amendment was withdrawn, as the Attorney General notes, in the belief that it would have raised issues concerning the constitutional dimensions of claims of executive privilege—a matter which is not raised, and could not be raised, by Secretary Morton in support of his refusal to comply with the Committee's subpoena. It was accordingly never voted on by Congress, and could in any event have no bearing on the intent of Congress with respect to data for which no executive privilege is claimed. As far as the 1962 proposal is concerned, it was withdrawn—as the Attorney General's letter also notes—on an assurance from the Department of Commerce that nothing in the statute prohibited the Department from furnishing information to a Congressional committee. To the extent that this piece of history is relevant at all, it seems inconsistent with the present claim that the Secretary is precluded by Section 7(c) from supplying information to the Committee unless he affirmatively finds that the withholding of it is contrary to the national interest.

The Attorney General's opinion is entirely dependent, therefore, on giving effect to a presumption against the right of Congress to access to information

where there are statutory restrictions on disclosure that do not refer one way or another to requests or demands from Congressional committee.

I do not find support for any such presumption in the three opinions of prior Attorneys General cited in the opinion letter. The most recent of those, 42 Ops. A.G. no. 46 (1974), dealt with the very explicit restrictions on access to tax returns that are set forth in Section 6103(a) of the Internal Revenue Code. The question addressed was whether these restrictions, which dealt directly with the rights of Congressional committees, were overriden by the special constitutional functions of the House Judiciary Committee in considering the impeachment of President Nixon. The second, 41 Ops. A.G. 221 (1955), came to the conclusion the Senate Committee involved was in fact authorized to receive the information it had requested despite the criminal law provisions of Section 1905 of Title 18 prohibiting disclosure "in any manner or to any extent not authorized by law." The opinion reserved only the question of some general executive privilege—"a discretion in the executive branch to withhold confidential papers" (p. 228)—that is not claimed here. Finally, the first opinion, 27 Ops. A.G. 150 (1909), only advised the Commissioner of Corporations to submit a request from a Senate Committee to the President under a statute which was construed as expressly delegating to the President the final judgment as to what data could properly be publicly disclosed. Neither it nor either of the subsequent opinions referred in any way to a legal presumption of statutory intent such as that on which the opinion of Attorney General Levi depends.

Further it seems to me that the presumption is quite backwards. It presumes that Congress would, without expressly considering the matter, deliberately cut itself off from access to information that it has deemed, by hypothesis, to be necessary to its oversight function. It presumes a general intent to frustrate in advance the effectiveness of its own investigative work. As already pointed out, moreover, the presumption is made controlling in the case of this particular statute when the statutory criterion is that the Secretary must determine that the withholding of information is not in the national interest, even though the Committee has necessarily made that determination itself by its investigation, and its subpoena for the material in controversy.

It is, of course, necessary always to keep in mind that Congressional committees, no less than officials of the executive branch, can abuse their powers. Much of the history of the debate over general claims of executive privilege stems from such abuses. But there is no such issue here—no dispute over Congressional inquiry into internal advice in the executive, or its decision—making process; no claim of constitutional privilege; no claim of traditional security interests; not even an argument over the relevancy of the information requested to the Congressional inquiry, or as to the need to have it for an effective investigation. In the absence of any simple procedure for resolution of the disagreement over the meaning of Section 7(c), it seems to me that these factors also weigh on the side of an accommodation by the executive to the felt needs of the legislative branch, on a matter that turns after all on a question of legislative intent.

For these reasons, it is my view that the Secretary's refusal to comply with the Committee is not justified by the arguments advanced by him, and by the Attorney General, in support of it.

Sincerely yours,

BURKE MARSHALL.

Mr. MOSS. Mr. Scheuer, I understand you have a request.

Mr. SCHEUER. Yes, Mr. Chairman.

You will recall that, in answer to several of the questions that we raised before Secretary Morton on our hearings on September 22, he directed a letter to you, Mr. Chairman, dated September 25, in which he announced a significant change in policy; namely, that, as of October 1, all firms which filed that they had been approached by the Arabs, would be required to also indicate whether they intended to comply with the boycott request or not.

So, in all fairness to the Secretary, as an indication of a significant change in his policy toward the boycott, however it may or may not relate to our request for full information, I would ask that this letter

of September 25 be placed in the record. I would ask unanimous consent for this as well as for the insertion in the record of the reporting form, both before and after October 1, on which we will indicate the language that has been left out in two significant areas, and a letter from me to the Secretary, dated October 2, and a letter from me to the distinguished chairman of this subcommittee, dated March 19, in which I, along with others, urged the distinguished chairman of this subcommittee to direct our attention to the Arab boycott.

At this point, I would like to state my gratitude and my high esteem and respect for the chairman of this subcommittee for the magnificent way in which he has led us through this thorny thicket, for his absolute determination to uphold the honor and integrity of this institution known as the U.S. House of Representatives, and for the outstanding leadership he has given this subcommittee and the entire Congress as well as the American people.

Mr. MOSS. The Chair thanks the gentleman from New York.

At this time on the matter of the unanimous consent request, is there objection?

Hearing none, the record will be held to receive the documents enumerated by the gentleman from New York.

[The documents referred to appear as appendix N, pages 180–184.]

Mr. MOSS. There being no further business, the committee will stand adjourned with our thanks, Professor Kurland, for your participation here today.

Mr. KURLAND. Thank you, Mr. Chairman.

[Whereupon, at 11:30 a.m., the subcommittee adjourned, subject to the call of the Chair.]

CONTEMPT PROCEEDINGS AGAINST SECRETARY OF COMMERCE, ROGERS C. B. MORTON

TUESDAY, NOVEMBER 11, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2175, Rayburn House Office Building, the Hon. John E. Moss, chairman, presiding.

Mr. MOSS. The subcommittee will be in order.

Although the subject of this subcommittee's inquiry is the effect of the Arab boycott on American commerce, an additional issue has been raised—the refusal by Commerce Secretary Rogers Morton to comply with a subpena issued by this subcommittee for boycott information. His conduct is the subject of today's hearing. However, a brief review of the subcommittee's Arab boycott investigation is in order.

The chairman's opening statement at a prior hearing on September 22, 1975, at which Secretary Morton appeared regarding the subcommittee's legislative authority to conduct this inquiry and the subcommittee's need for the reports in question remains fully applicable here. The Chairman will not repeat that very complete statement except as to the subcommittee's jurisdiction.

This subcommittee's jurisdiction arose under the legislative powers of Congress specified in article I of the Constitution and the Rules of the House of Representatives. Rule X established the Committee on Interstate and Foreign Commerce and gives it jurisdiction over, among many others, the following:

> . . . Interstate and foreign commerce generally
> . . . Consumer affairs and consumer protection
> . . . Securities and exchanges

Included within the committee's jurisdiction are statutes administered by the Federal Trade Commission and the Securities and Exchange Commission.

Section 5 of the Federal Trade Commission Act provides:

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

Section 10(b) of the Securities Exchange Act of 1954 provides that any "manipulative or deceptive device or contrivance" relating to the sale or purchase of securities is unlawful.

In addition, under the regulations of the Securities and Exchange Commission (17 CFR 240.14a-1), public corporations are required

to afford stockholders the opportunity to have proxy materials included in the proxy statement sent to stockholders, including such matter relating to the practices of a corporation regarding a proposed boycott request.

Furthermore, under the Securities Acts Amendments of 1975 (Public Law 94–29), the Commission has authority to apply to Federal courts to enjoin violations of the rules of any industry self-regulatory organization.

The National Association of Securities Dealers' rules of fair practice require that its members observe just and equitable principles of trade in the conduct of the securities business.

This subcommittee is the oversight arm of the Committee on Interstate and Foreign Commerce with jurisdiction concurrent with that of the full committee. The subcomittee's oversight responsibilities are set forth in rule X of the Rules of the House of Representatives as follows:

> Each standing committee (other than the Committee on Appropriations and the Committee on the Budget) shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated.
>
> In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of that committee.

In the spring of this year, the subcommittee began an inquiry into the nature and scope of the Arab boycott of American firms. It was prompted by requests from many persons, and members of the subcommittee, particularly subcommittee member, the Honorable James H. Scheuer of New York.

The subcommittee has communicated with the secretaries and chairmen of several departments and agencies concerning the boycott practices and laws applicable to their resective departments. Subcommittee staff have interviewed various parties affected by the boycott, including American export firms who have done business in the Middle East.

In order to do business in Arab countries, American firms have been forced to join the boycott against Israel. According to the terms of the boycott, firms must agree not to do business with Israel, with companies who do business with Israel or who are otherwise on the boycott list, which includes companies managed by Jews.

That boycott is clearly contrary to American principles of free trade and freedom from religious discrimination. It also appears violative of antitrust and other Federal laws. In fact, there are at least 10 Federal laws, including the Federal Trade Commission and Securities and Exchange Acts, which appear to be applicable to the boycott practices.

The subcommittee has obtained information from some domestic corporations who have lost substantial export business as the result

of having been placed on the Arab boycott list. I think an example is a recent letter from RCA stating that they lost $9 million last year as a result of having been placed on the Arab boycott list.

In the course of our investigation, the subcommittee has come into possession of documents evidencing efforts by foreign firms and American firms to cause other American firms or individuals to agree to boycott provisions. Copies of these documents have been furnished to Secretary Morton and the Attorney General.

The subcommittee has also obtained copies of offers to do business from Arab countries that were circulated in this country by the Department of Commerce, despite the fact that these offers had boycott clauses, and despite the fact that such a boycott is violative of the policy expressed in the Export Administration Act (50 U.S.C. App. 2402).

On July 10, the subcommittee wrote to the Director of the Office of Export Administration of the Department of Commerce requesting reports of boycott requests which have been filed with the Department pursuant to the Export Administration Act. These reports include every instance in which a boycott request has been made to an American company. They include information on whether the company has agreed to comply with the boycott.

Secretary Morton declined to produce these reports, citing section 7(c) of that act as a basis for his refusal. That section provides:

> No department, agency, or official exercising any functions under this act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.

The Chair responded at the hearing of September 22, 1975, and in writing to Secretary Morton that section 7(c) does not in any way refer to the Congress and that no reasonable interpretation of that section could support the position that Congress by implication had surrendered its legislative and oversight authority under article I of the Constitution.

When the boycott reports were not produced, the subcommittee issued a subpena at a subcommittee meeting on July 28. The return date of the subpena was adjourned by the Chair, at the request of the Secretary, until September 22.

At that time, Secretary Morton was present at a subcommittee hearing pursuant to the order of the subpena duces tecum. However, Secretary Morton did not bring the boycott reports as directed by the subpena.

Instead, he explained that he had been given an opinion by the Attorney General advising him that he need not comply. That opinion echoed Secretary Morton's argument that he could not comply with the subcommittee's subpena because of section 7(c) of the Export Administration Act.

The Chair again advised Secretary Morton that 7(c) did not mention Congress and, accordingly, did not include Congress, for Congress cannot surrender its constitutionally mandated duty of oversight in a statute unless it does so expressly, and not by silence or implication.

The Chair, after extensive questioning of Mr. Morton by the Members present, then ordered and directed the Secretary to produce the documents. The Secretary refused. The Chair then informed Secretary Morton that he found the Secretary's conduct sufficient to constitute contempt of Congress and that the matter would be taken under advisement by the subcommittee.

On October 21 and 22, the subcommittee received the testimony of three noted legal scholars in the field of constitutional law, all of whom have written on the subject of executive privilege and the problems of Congress gaining information held by the Executive. They included:

Prof. Raoul Berger, Charles Warren, senior fellow in American Legal History at Harvard University;

Prof. Philip Kurland who teaches constitutional law at the University of Chicago; and

Prof. Norman Dorsen who teaches the same subject at the New York University School of Law and is general counsel to the American Civil Liberties Union.

All agreed that the subcommittee is authorized to compel the production of the boycott reports from Secretary Morton, and that section 7(c) of the Export Administration Act is not a lawful bar to the subcommittee's subpena.

Professor Berger said:

> In my opinion, section 7(c) of the Export Act is not applicable to a congressional demand for confidential information; it does not absolve the Secretary of Commerce from compliance with the subpoena of your subcommittee.

Professor Kurland commented:

> . . . I am of the opinion that, as a matter of law, [the Secretary and the Attorney General] are wrong in their claim for executive immunity from congessional oversight in this matter . . .
>
> * * * * * * *
>
> . . . Section 7(c), which is totaly silent on the surrender of the congressional investigatory power, cannot be utilized to suport the failure of Secretary Morton to surrender to this subcommittee the documents subpoenaed from him . . .
>
> * * * * * * *
>
> I urge this subcommittee not to contribute to the continued destruction of congressional authority. The constitutional plan of checks and balances, an essential safeguard for American liberties, is constantly endangered by failure of Congress to assert its authority vis-a-vis the Executive. I trust that this case will not prove another instance of such surrender; the rights at stake are not those of individual Congressman, they are the rights of the American people whose representatives you are . . .

And Professor Dorsen made this statement:

> The subcommittee has the constitutional right to obtain the names of the firms from the Secretary of Commerce. The Secretary has not asserted a constitutional right to withhold the information, and section 7(c) should not be interpreted to apply to a request from the Congress.
>
> * * * * * * *
>
> [T]he power of Congress to investigate the executive branch is very broad and should be defeated, if at all, under very limited circumstances.
>
> [T]here is in fact no constitutional privilege, whether denominated "executive privilege" or something else, to warrant the withholding of the information here . . .

These three opinions, together with a fourth from the American Law Division of the Library of Congress, were hand-delivered to the Secretary with the information that he would be given a reasonable time to read the opinions and an opportunity to purge himself of contempt.

Thus, today's hearing which continues to be pursuant to the subcommittee's subpoena of July 28, 1975, is for the purpose of determining if Secretary Morton will now furnish the information the subcommittee has subpoenaed and purge himself of the contempt of this subcommittee and the Congress.

The Chair, Mr. Secretary, observes that you have been sworn and continue subject to the oath taken at the time of your previous appearance, it being that this is a continuation of those proceedings.

I have the following questions I would like to direct to you now, sir.

On July 30, 1975, you were duly served with a subpena duces tecum from this subcommittee which ordered you to produce all boycott reports filed with the Department of Commerce, Office of Export Administration, pursuant to the Export Administration Act and regulations thereunder.

Did you receive the subpena?

TESTIMONY OF HON. ROGERS C. B. MORTON, SECRETARY OF THE DEPARTMENT OF COMMERCE

Secretary MORTON. Yes, sir.

Mr. MOSS. The pertinency of these documents to the subcommittee, to its legislative and oversight activities, has been explained to you in my opening statement of September 22, 1975, in my opening statement today, and in my correspondence with you.

I now order and direct you to provide the subpenaed documents to the subcommittee.

Have you brought them with you?

Secretary MORTON. No, sir.

Mr. MOSS. Why have you not brought the subpenaed documents with you?

Secretary MORTON. Mr. Chairman, I have not brought them because I do not believe that I am required to bring them.

Mr. MOSS. You rely on what section of law or of the Constitution in reaching that decision?

Secretary MORTON. Section 7(c) of the Export Administration Act.

Mr. MOSS. Is that the only excuse or defense that you have?

Secretary MORTON. I also believe that it is not in the national interest to do so.

Mr. MOSS. That is a determination based upon section 7(c); is that correct?

Secretary MORTON. That is correct.

Mr. MOSS. Therefore, section 7(c) is the only excuse or defense that you have?

Secretary MORTON. I have an opinion from the Attorney General which I am relying on as far as the interpretation of the act is concerned.

Mr. MOSS. Mr. Secretary, do you understand that the responsibility for complying with the subpena is yours and not the Attorney Gen-

eral's, and reliance on a legal opinion is not a defense to your refusal to comply with a lawful subpena?

Secretary MORTON. I think what is raised here is a legal issue. Ultimately, that legal issue will have to be resolved by the courts.

Mr. MOSS. Mr. Secretary, it is the opinion of the Chair that you are advised, while your attorney may give you advice, you, as the Secretary, have to make the final determination, have you not?

Secretary MORTON. That is correct.

Mr. MOSS. Mr. Secretary, it is the opinion of the Chair that you are in contempt of the subcommittee and the Congress when you failed to supply these documents on September 22, 1975.

Nonetheless, in order to give us further opportunity to review your position, the subcommittee heard testimony from three leading experts on constitutional law. They are Profs. Raoul Berger, Philip Kurland, and Norman Dorsen.

These opinions, together with the opinion of the American Law Division, Library of Congress, were provided to you. Did you receive them?

Secretary MORTON. Yes; I did.

Mr. MOSS. These opinions conclude that the defense you have raised which is based on the Attorney General's letter of September 4, and I understand an additional letter, copy of which was delivered to the Chair at 9:37 this morning, has also been given to you restating the substance of the September 4 opinion—however, these opinions include and would encompass that letter—that it is unjustified and without foundation.

Have these opinions caused you to reconsider your position?

Secretary MORTON. No; they have not.

Mr. MOSS. Mr. Secretary, it continues to be the opinion of the Chair that you are without legal justification in your refusal to comply with the subcommittee's subpena and you are in contempt of the subcommittee and the Congress.

Do you still refuse to supply the subpenaed documents?

Secretary MORTON. I do.

Mr. MOSS. Do you understand by virtue of your refusal the matter may be referred to the full Committee on Interstate and Foreign Commerce and to the House of Representatives for appropriate action, including criminal action?

Secretary MORTON. I do.

Mr. MOSS. In view of your continued refusal to comply with the subcommittee's subpena, the Chair will now recognize the gentleman from New York.

Mr. SCHEUER. Mr. Chairman, I move that the subcommittee on Investigations approve the following resolution and order.

Mr. MOSS. The clerk will report the resolution.

The Clerk [reading]:

Subcommittee Resolution and Order.

Resolved, That the Subcommittee finds that none of the excuses or defenses offered by Rogers C. B. Morton, Secretary, U.S. Department of Commerce, con-

stitutes any valid reason not to comply with the subpoena ordered by the Subcommittee and dated July 28, 1975, and that it is

Ordered that Secretary Morton do comply with that subpoena.

Mr. Moss. The gentleman from New York is recognized on his motion.

Mr. SCHEUER. Mr. Chairman, I urge the subcommittee to pass this motion.

There has been no legal justification for the Secretary's refusal to give us this information. It is information that we need in order to ascertain the loss to American commerce as a result of some companies doing business with the Arabs and not with the Israelis and of others doing business with the Israelis and not with the Arabs. We must determine how certain companies stand up to the Arab boycott and yet continue to do business with both the Arabs and the Israelis.

Mr. Chairman, especially in view of yesterday's disastrous development at the U.N., where the General Assembly seemed to convert itself into an instrument of racism and oppression, it is quintessentially important for our Government to make it clear that we disavow and reject these racist actions. We must take all appropriate steps to put our own house in order. Foremost on the list of things that we must do in order to accomplish this is to insure that the executive branch of this Government do all that it should, and can do to minimize the effects of the Arab boycott. Indeed, we must be given the information that we need so that we can make participation in the Arab boycott illegal under the laws of the United States of America.

Mr. Moss. Does the gentleman from Texas desire to be recognized?

Secretary MORTON. Mr. Chairman, could I have a copy of the resolution? I was unable to hear the lady.

Mr. Moss. The Chair will read it.

Resolved, that the Subcommittee finds that none of the excuses or defenses offered by Rogers C. B. Morton, Secretary, United States Department of Commerce, constitutes any valid reason not to comply with the subpoena ordered by the Subcommittee and dated July 28, 1975, and that it is

Ordered that Secretary Morton do comply with that subpoena.

Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. Secretary, I want to commend you on the position that you take. I believe that you represent a precedent and perhaps a tradition that I hope we can carry on in this country.

As I understand the issue here, what they are trying to do among this committee membership is to invoke contempt based on the fact that you are a man of honor and you have said that the law of Congress has specified that you shall not divulge information, and you are living within the terms as specified by Congress.

Now, the statute specifies that you must base your determination on the national interest.

What is the national interest of the United States?

We get into the subject of boycotts because it is an international boycott incident to the national interest of the United States?

Many times in Congress we are inconsistent but never have we been as inconsistent as we are among the membership of this committee, because twice this year we have ruled on the subject of boycotts.

Most of my colleagues on the other side of the aisle who are raising this very issue have on two different occasions said they favor boycotts.

We have men sitting here today passing judgment on this issue of what is to be the national interest who have on two occasions, who have on the occasion of the United Nations putting a boycott on Rhodesia, saying they believed in that boycott, who have on secondary boycotts regarding labor in this country said they believe in boycotts.

Now, I don't believe in boycotts against Rhodesia. I don't believe in secondary boycotts and I don't believe in Arab boycotts, but we are the most inconsistent in the world.

Now, asking you to say that this is in the national interest on this one occasion is perhaps most inconsistent.

I want to come back and say that you have acted in good faith. I was most impressed with your statement here where you have approached our friends in Israel, where you have talked to the Minister of Commerce, the Honorable Bar Lev, and you have asked him does he know of any specific situations, that you have said on those specific situations we want to do what we can and we want to follow them up.

You have not talked in generalities. You have talked in specifics.

That we should come in here where you have acted in good faith, where you have abided by the law of Congress, and say that you are in some way in contempt is the most ridiculous thing that we have done in this committee this year.

Thank you, Mr. Chairman.

Mr. Moss. The Chair will only observe that the statement just made by the gentleman from Texas in the Chair's humble opinion constitutes one of the most ridiculous assertions he has heard in 23 years as a Member of the House.

I am so pleased that the gentleman desires to operate in a vacuum, having information withheld from him as a Congressman. I commend him. I hope he is as consistent when his party is out of power.

The Chair now puts the question.

Mr. WAXMAN. Mr. Chairman, I would like to be heard on this question.

Mr. Moss. Mr. Waxman.

Mr. WAXMAN. Mr. Secretary, I wish to address my remarks to you because I think what Mr. Collins said as far as your acting in good faith and your being an honorable man is correct.

But there are two broad issues involved in your refusal to comply with the subpena issued by this committee.

Originally, we started this hearing and this investigation to look into the question of the Arab boycott. That issue has been put aside temporarily while we get into the issue of the executive versus the legislative branches of Government in terms of our right to information.

Let me turn to the first issue.

The question of the Arab boycott is one that threatens the very fabric of this country. The President of the United States came out very forthrightly and opposed the Arab boycott.

I resented the statement by my colleague, Mr. Collins, that we are inconsistent on boycotts and therefore we can be inconsistent on this boycott.

There is no place in American society to acquiesce or accept a boycott based on the religious affiliations of our own citizens.

The Export Administration Act makes it very clear that it is the policy of this Government to oppose such a boycott.

The point I want to raise with you at this moment in time is that when we see the United Nations voting an abominable resolution saying that Zionism is racism, and an organization founded on reaction to Nazism now turns around and adopts Nazilike statements, at a time when we see the Arab boycott increasing its momentum, it is very important for you, Mr. Secretary, as a leader of this Government, to be very clear in all signals and in all ways that we oppose this boycott.

That signal is not there to those who would have us enter into discriminatory boycotts against our own people when the Secretary of Commerce refuses "in the national interest" to give a committee of Congress information about the success of legislation we passed or oppose that very boycott.

The second major issue, one we didn't intend to get into when we looked into the issue of boycotts, is the very essence of our constitutional system.

Can the executive branch, to which we have given certain authority to enforce the laws, turn around and say to the Congress which passed the legislation, which now has the power of oversight to see that the legislation is being carried out, that the Congress cannot have the information?

The statute says that the Secretary can determine not to make certain matters public, but to say that the matters he will not make public to the general public is the same as saying he will not make these matters available to the U.S. Congress is a mockery of our constitutional system.

I wanted to say this to you, Mr. Secretary, as a last-minute appeal to you to change your mind.

Mr. Kurland, a distinguished law professor from the University of Chicago, told us that the Attorney General in his position, giving you the opinion he did, is acting as your counsel, not giving a judgment but giving a partisan position.

Let us abandon that partisan position.

It is important that we join together to make it very clear that we oppose this boycott at this particular moment in hisory. If we fail, those two broad issues will be before us, and I am afraid that in leaving your position as Secretary you will be doing a great disservice if you leave under these circumstances without having these issues resolved.

Thank you, Mr. Chairman.

Mr. Moss. Is there further discussion?

If not, the Chair will put the question.

Mr. Collins. A parliamentary inquiry.

What is the effect of this resolution?

Mr. Moss. It is a direction of the subcommittee to the Secretary at this point.

Is there further discussion?

If not, the Chair will put the question.

Those who favor the resolution will indicate by saying "aye."
Opposed, "no."
The clerk will call the role.
The CLERK. Ottinger.
Mr. OTTINGER. Aye.
The CLERK. Mr. Krueger.
Mr. KRUEGER. Aye.
The CLERK. Mr. Moffett.
Mr. MOFFETT. Aye.
The CLERK. Mr. Santini.
Mr. MOSS. Mr. Santini, "aye," by proxy.
The CLERK. Mr. Stuckey.
Mr. STUCKEY. Aye.
The CLERK. Mr. Scheuer.
Mr. SCHEUER. Aye.
The CLERK. Mr. Waxman.
Mr. WAXMAN. Aye.
The CLERK. Mr. Sharp.
Mr. SHARP. Aye.
The CLERK. Mr. Maguire.
Mr. MOSS. Mr. Maguire, "aye," by proxy.
The CLERK. Mr. Collins.
Mr. COLLINS. No.
The CLERK. Mr. Lent.
Mr. Madigan.
Mr. Rinaldo.
Mr. Staggers.
Mr. Devine.
Mr. DEVINE. No.
The CLERK. Chairman Moss.
Mr. MOSS. Aye.
The CLERK. Mr. Chairman, the vote is 10 "aye," two "nay".
Mr. MOSS. Mr. Secretary, you have heard the resolution of the subcommittee and its adoption.
Do you still refuse to produce the subpenaed documents?
Secretary MORTON. I do.
Mr. MOSS. Mr. Secretary, in view of that fact, the Chair must state he is of the very firm opinion that you now clearly committed contempt of the Congress of the House of Representatives of the United States.
Does the gentleman from New York have a motion at this time?
Mr. SCHEUER. Yes, Mr. Chairman; I have a further motion.
Mr. MOSS. The Chair will report the motion.

Resolved, that the Subcommittee finds Rogers C. B. Morton, Secretary, United States Department of Commerce, in contempt for failure to comply with the subpena ordered by the Subcommittee and dated July 28, 1975, and the facts of this failure be reported by the Chairman of the Subcommittee on Oversight and Investigations to the Committee on Interstate and Foreign Commerce for such action as that Committee deems appropriate.

Is there discussion on the resolution?
Mr. COLLINS. A parliamentary inquiry, Mr. Chairman.

Have there been similar resolutions of this type offered in Congress as a precedent for a Secretary of the Cabinet?

Mr. Moss. Indeed there has.

Mr. Collins. What is it, Mr. Chairman.

Mr. Moss. I have to go back a number of years. We had a couple of Secretaries during the Teapot Dome days who were found in contempt of Congress. It does not matter who the person is, the act of contempt has been committed.

The chairman, as a member of this committee, has voted for the citation of Sherman Adams for contempt of Congress and of Federal Communications Commission Chairman Rosel Hyde, for contempt of Congress.

It matters not who commits the contempt; the act, itself, is what the Chair finds to be offensive

Mr. Devine. Mr. Chairman.

Mr. Moss. Mr. Devine.

Mr. Devine. I think the record should be quite clear.

I believe the Secretary in declining to honor the subpena did so on advice of counsel, not only counsel in the Department of Commerce where he then served, but also on the advice of the Attorney General of the United States who is the legal officer for Cabinet officers of the United States.

I think the record should be quite clear, that is the basis on which he declined to honor the subpena.

Mr. Moss. The record, of course, is abundantly clear on that point.

There are some interesting Supreme Court cases to the contrary as to the value of such advice. At best, the Attorney General at this moment appears as a partisan advocate for the executive branch of Government and the Congress has to protect its own powers.

Mr. Devine. If the chairman will yield, I will admit there are contrary views, some by employed counsel for this committee, or consultants, and that is why I think that since there is a dispute between the various legal authorities, that the matter should ultimately be resolved in the courts rather than in the Congress.

Mr. Moss. Of course, the power of contempt, as the gentleman from Ohio is quite aware, is a power possessed by the Congress. The fuller details will be met head-on as we move along.

Is there further discussion?

Mr. Stuckey. Mr. Chairman, I have one brief question I would like to ask of the Secretary.

Mr. Moss. Mr. Stuckey.

Mr. Stuckey. You state that your failing to honor the subpena is based on advice of counsel and the Attorney General.

Is this the only area that you have been advised from not to honor the subpena?

Secretary Morton. That is correct—no; I have been advised officially by them, but the decision was made, Congressman, as a result of discussions with many experts in the Department, as well as my legal counsel.

In that sense, my counsel and I are not the only participants in the decision.

Mr. STUCKEY. Would the advice not to honor the subpena come from other than your Attorney General, your counsel, and the Department?

Secretary MORTON. Other than that, no, sir; there has been no other advice from outside sources, if that is what you are saying.

You mean other than within the Department?

Mr. STUCKEY. Yes.

Secretary MORTON. Let me put it this way, Congressman Stuckey.

We have not been counseled to take this position from any outside sources.

Mr. STUCKEY. I think I used the word "advised."

Secretary MORTON. Advised to take this position.

However, since we have not been advised not to take this position, it is obvious that there has been some concurrence. I do not know what the limit of that concurrence is but I am sure others would have spoken up if they had disagreed with this position in the administration.

Mr. MOSS. Is there further discussion?

Mr. KRUEGER. Mr. Chairman.

Mr. MOSS. Mr. Krueger.

Mr. KRUEGER. I am inclined to support the motion.

It seems to me that the legislative branch, when it asks the Executive to acquire information, does so with the assumption that the legislative branch will be allowed to use that information.

I should also point out that it is my judgment that the legislative branch, at the same time that we are moving to make all sorts of information public, should not go about asking for information the disclosure of which could then be very damaging and could seem to accuse companies, which might very well be innocent, of any accusations which might be brought to them.

It seems to me if we acquire information and the information is acquired from companies with the understanding that it be kept confidential, that it will, of course, be incumbent upon us to retain that information as being confidential if we receive it and that to avoid the same sort of charges of misusing the information we receive, we must be fully aware that the confidentiality must then remain with us.

I will vote to say that the legislative branch is indeed entitled to this information but I would simply like to go on record on that point that I think that it is incumbent on us now and it is incumbent on us in the future not to ask the executive branch to acquire information where there is then the danger of revealing it.

It seems to me there is a sort of conflict there between our intentions.

Thank you, Mr. Chairman.

Mr. MOSS. Is there further discussion?

Mr. MOFFETT. Most of us have not been through this process. Of course, the Secretary has not been through it in that role.

Am I correct in assuming that before this matter does go b e the full committee, if he should change his mind and see the ligh——

Mr. MOSS. The Secretary will continue to be answerable to the subpena until the matter is disposed of.

There being no further discussion, the Chair will put the question.
So many as favor the resolution will indicate "aye."
Those opposed will indicate the contrary.
The clerk will call the role.
The CLERK. Mr. Ottinger.
Mr. OTTINGER. Aye.
The CLERK. Mr. Krueger.
Mr. KRUEGER. Aye.
The CLERK. Mr. Moffett.
Mr. MOFFETT. Aye.
The CLERK. Mr. Santini.
Mr. MOSS. Mr. Santini, "aye," by proxy.
The CLERK. Mr. Stuckey.
Mr. STUCKEY. Aye.
The CLERK. Mr. Scheuer.
Mr. SCHEUER. Aye.
The CLERK. Mr. Waxman.
Mr. WAXMAN. Aye.
The CLERK. Mr. Sharp.
Mr. SHARP. Aye.
The CLERK. Mr. Maguire.
Mr. MOSS. Mr. Maguire, "aye," by proxy.
The CLERK. Mr. Collins.
Mr. COLLINS. No.
The CLERK. Mr. Lent.
Mr. LENT. No.
The CLERK. Mr. Madigan.
Mr. COLLINS. "No," by proxy.
The CLERK. Mr. Rinaldo.
Mr. COLLINS. "No," by proxy.
The CLERK. Mr. Staggers.
Mr. Devine.
Mr. DEVINE. No.
The CLERK. Chairman Moss.
Mr. MOSS. Aye.
The CLERK. Mr. Chairman, the vote is 10 "aye," and 5 "nay."

Mr. MOSS. Mr. Secretary, the Chair will at this point express his personal regret over the need to take this action. The refusal left him responsibly with no alternative available.

The subcommittee will now bring the matter before the full Interstate and Foreign Commerce Committee and recommend the adoption of the resolution and its movement to the floor of the House of Representatives.

With that, the subcommittee will now stand adjourned, with the Chair cautioning that you remain subject to the subpena duces tecum issued on July 28.

[Whereupon, at 10:55 a.m., the subcommittee adjourned.]

APPENDIXES

APPENDIX A

HOUSE OF REPRESENTATIVES,
INTERSTATE AND FOREIGN COMMERCE COMMITTEE,
CHAIRMAN, OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE,
Washington, D.C., April 7, 1975.

Hon. RAY GARRETT, Jr.,
Chairman, Securities and Exchange Commission, Washington, D.C.

DEAR MR. GARRETT: Congressman Scheuer of New York has told me of his deep concern over what he describes as the repeated, serious and reliable reports of Arab boycotting and economic discrimination against Jewish and other members of the U.S. business community, both at home and abroad.

Congressman Scheuer was kind enough to furnish me with a copy of your letter to him of February 25 in this regard, a copy of which I am enclosing for your ready reference. I should deeply appreciate your furnishing me with a detailed, current report on this matter, making specific reference to whatever concrete action the National Association of Securities Dealers has taken with respect to the alleged Arab boycott.

It might also be helpful to learn what "authority under the Federal securities laws" the Commission does have "to control the composition of financing syndications" as such authority relates to any such boycott.

May I have your judgment on the adequacy of the NASD's action as well as any recommendations you may have for additional legislation? Please call Chief Counsel Michael R. Lemov, or Special Assistant Richard Falknor, at 225-4441, if you have any questions.

Sincerely,

JOHN E. MOSS, *Chairman,*
Oversight and Investigations Subcommittee.

Enclosure

SECURITIES AND EXCHANGE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., February 25, 1975.

Hon. JAMES H. SCHEUER,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN SCHEUER: Pursuant to the discussion between Richard Falknor of your office and Andrew P. Steffan of our staff with regard to the alleged boycotting of certain investment bankers, I would like to report to you the following.

It is our impression from discussions with members of the financial community that, although in several financings managed by non-U.S. investment banks participating Arab institutions apparently have successfully sought the exclusion of firms which appear on an Arab "boycott list", there have been no cases where any U.S. firms have been excluded on such a basis from financing syndicates organized to offer securities registered with the Commission.

The Commission does not have explicit authority under the federal securities laws to control the composition of financing syndications. However, the Rules of Fair Practice of the National Association of Securities Dealers, Inc., which we oversee, do provide that its members observe just and equitable principles of trade in the conduct of their business. Article III, Sec. 1.02 specifically extends this provision to members' participation in the distribution of securities and it is possible that members' participation in an Arab boycott could violate this rule. I am enclosing a release from the N.A.S.D. announcing the investigation of this matter by one of its standing committees.

We have discussed this matter with Under Secretary of the Treasury Jack Bennett and with officials of the State Department and Justice Department. We will report to you any further developments on this matter.

Sincerely yours,

RAY GARRETT, Jr., *Chairman.*

NEWS RELEASE FROM THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Washington, D.C., February 25, 1975—Gordon S. Macklin, President of the National Association of Securities Dealers, Inc., the self-regulatory organization for the over-the-counter securities market, announced today that the Association is considering what action, if any, it might take in connection with recent reports of requests of Arab interests that NASD members boycott certain other NASD members in forthcoming financings. A special meeting of the Association's Committee on Corporate Financing will be held in New York City on Friday, February 28, 1975, to consider these recent events.

The Committee, consisting of 15 individuals from the securities industry, is charged with responsibility for reviewing all aspects of members' underwriting activities in order to assess, report and make recommendations to the Association's Board of Governors. Mr. Macklin stated that the primary item on the Committee's agenda is the study and consideration of the extent and nature of reported requests that Association members boycott others on the basis that their participation in an underwriting would be undesirable solely for reasons unrelated to the investment banking or securities business. He also stated that the problem to be considered is related to reported worldwide requests by Arab interests that firms unsympathetic with or antagonistic to them be boycotted.

While it would be premature to indicate what position the Committee might take in its deliberations, he indicated that a boycott of this nature could be considered to be a violation of just and equitable principles of trade, the keystone rule underlying the Association's regulation of its members, and that recommendations for disciplinary action could result.

* * *

SECURITIES AND EXCHANGE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 2, 1975.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. MOSS: This is in response to your letter, dated April 7, 1975, regarding your discussions, with Congressman Scheuer of New York, about reports of an Arab boycott of, and economic discrimination against, "Jewish and other members of the U.S. business community, both at home and abroad." As your letter indicates, we previously had discussed this subject with Congressman Scheuer, and he has furnished you with a copy of our prior correspondence.

In your letter, you request "a detailed, current report on this matter, making specific reference to whatever concrete action the National Association of Securities Dealers has taken with respect to the alleged Arab boycott," and you also inquire what authority the Commission "does have 'to control the composition of financing syndications' as such authority relates to any such boycott." Finally, you request our judgment on the "adequacy of the NASD's action as well as any recommendations" we may "have for additional legislation."

BACKGROUND

Earlier this year, as you know, there were newspaper reports that some Arab investment bankers were attempting to condition their participation in certain underwriting syndicates on the exclusion of investment banking firms appearing on a so-called "Arab boycott list," presumably because they either are owned by Jews or because they do business with Israel. Upon learning of these reports, we immediately discussed them with several members of the American underwriting community and with the NASD.

As a result of our discussions, we were persuaded that, although some firms on the Arab boycott list had, in fact, been excluded from several offerings of

securities not registered with the Commission and managed by non-American investment banking firms, there had been no cases where firms which appear on such a boycott list were excluded from financing syndicates either managed by members of the NASD or offering securities registered with this Commission. The NASD advised us of their concern over this matter and the relevance of their rules of fair practice, and indicated that its Committee on Corporate Financing would review the situation.

EXTENT OF BOYCOTT

In the two months since we first wrote to Congressman Scheuer, we have not learned of any cases where firms were excluded from financing syndicates organized to offer securities registered with this Commission because of their Jewish ownership or the fact that they transact business with Israel. We also are advised, as a result of our inquiries, that, in many overseas offerings of securities which are not registered with the Commission, the investment bankers managing the syndicates have followed a similar policy.

There have, in fact, been syndicates in which both Arab and supposedly boycotted firms have participated, as the two enclosed advertisements for recent overseas offerings make clear. We are encouraged that, at least in these two instances, the best American investment banking traditions appear to have been followed.

NASD ACTIVITIES

Subsequent to our original discussions with the NASD, its Committee on Corporate Financing met, on February 28, 1975, to discuss this matter, and the members agreed that, if NASD member firms should participate in such boycotts, they likely would be in violation of just and equitable principles of trade which the NASD, by law, must enforce. The Committee, therefore, instructed the NASD staff to monitor the membership of future financing syndicates to assure that such a practice does not occur. The Committee also concluded that American investment bankers were firmly resisting any pressures to exclude so-called boycotted firms from financing syndicates. Since commencing its monitoring efforts, the NASD reports that it has not identified any relaxation of that standard, and its staff continues to monitor syndicates to ensure that no relaxation will occur. In addition, I have had personal discussions with the NASD Board of Directors, and we are confident that the NASD has this matter under control.

You may also be interested to know that the Attorney General of the State of New York has asked all New York brokers and dealers to complete a questionnaire on this matter. We are hopeful that, when all the information has been compiled, we may gain further insights into the scope of any problem that should exist.

COMMISSION AUTHORITY

As I indicated in my first letter to Congressman Scheuer, the Commission does not have explicit authority under the federal securities laws to control the composition of financing syndicates. The bases upon which brokerage firms determine to participate in underwriting syndicates was not thought to merit federal, as opposed to industry, supervision by the Congress in 1933 and 1934, and that decision still seems correct, more than forty years later. Nevertheless, the NASD's Rules of Fair Practice do require that its members observe just and equitable principles of trade in the conduct of their business. Article III, Section 1, thereof, specifically extends this requirement to members' participation in the distribution of securities.

We, of course, are required under present law to ensure that the NASD continues to fulfill its statutory obligations, including its enforcement against member firms of just and equitable principles of trade. While we cannot now take direct action to enforce compliance by brokers and dealers with the NASD's rules, both H.R. 4111 and S. 249 would amend the Securities Exchange Act of 1934 to permit us to apply to a federal court for an order to enjoin violations of the rules of any self-regulatory organization, or to command self-regulatory organizations to enforce compliance by their members with their own rules. Both bills also would make explicit the Commission's authority to require all self-regulatory organizations to adopt specific rules, if such rules should be required.

For these reasons, I do not see any need for further legislation at this time, although we do hope that the Congress can act expeditiously to complete its consideration of the pending bills.

CONCLUSIONS

As with any action of this type, perspective is most important. At present, the boycott does not appear to be a factor in any syndicates offering securities that fall within our jurisdiction. In light of our current information and the seemingly unanimous industry views in this regard, we believe the NASD is the appropriate body, in the first instance, to ensure that no deterioration of just and equitable principles of trade occurs, and that its policy—of carefully monitoring the situation—is appropriate. If it should be appropriate, there appears to be a sufficient basis upon which further action may be predicated.

I trust the foregoing information will prove helpful to you. If you should desire any further information, please do not hesitate to advise me. Naturally, we shall keep you apprised of any significant future developments with respect to this matter.

Sincerely yours,

RAY GARRETT, Jr., *Chairman.*

APPENDIX B

DEPARTMENT OF JUSTICE,
Washington, D.C., June 18, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, 2323 Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for information concerning law enforcement activities of the Department of Justice relating to the Arab boycott of firms dealing with Israel.

The principal statute enforced by this Department which may apply to these matters is the Sherman Antitrust Act, 15 U.S.C. 1, which provides civil and criminal sanctions for "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." As I discussed at some length in recent testimony before a Subcommittee of the House Committee on Foreign Affairs, a copy of which is enclosed, certain conduct related to the Arab boycott may constitute a violation of this provision.

No lawsuit under the Sherman Act has yet been commenced by the Department with regard to activities connected with the Arab boycott. Alleged violations involving such activities are currently being investigated by the Antitrust Division. Because the investigations are still in progress, I cannot provide detailed or specific information regarding them. A number of investigative techniques are being employed, including review of pertinent files of other federal departments, interviews with officers of firms which may have been affected by the boycott, and issuance of civil investigative demands under 15 U.S.C. § 1312 to certain firms under investigation. The taking of enforcement action will depend of course upon the outcome of those activities.

Sincerely,

ANTONIN SCALIA,
Assistant Attorney General,
Office of Legal Counsel.

Enclosure.[1]

APPENDIX C

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., April 7, 1975.

Hon. JACK BENNETT,
Under Secretary for Monetary Affairs,
Department of the Treasury,
Washington, D.C.

DEAR MR. BENNETT: Congressman Scheuer of New York has told me of his deep concern over what he describes as the repeated, serious and reliable reports

[1] Copy of the testimony referred to in the letter is in the files of the Subcommittee.

of Arab boycotting and economic discrimination against Jewish and other members of the U. S. business community, both at home and abroad.

In this regard, I am enclosing a report from the Chairman of the SEC indicating that he has been in close touch with you in an effort to deal with this problem.

Would you kindly furnish me with an up-to-date estimate of this situation and any pertinent recommendations you may have?

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

* * *

DEPARTMENT OF THE TREASURY,
Washington, D.C., April 10, 1975.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, Interstate and Foreign Commerce Committee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: For Under Secretary Bennett who is presently out of the country, I am acknowledging your letter of April 7 enclosing copies of correspondence relating to alleged reports of Arab boycotting and economic discrimination against Jewish and other members of the U.S. business community at home and abroad.

You will have a further report concerning this matter as soon as possible.

Sincerely yours,

FREDERICK L. WEBBER,
Assistant Secretary,
Legislative Affairs.

* * *

THE UNDER SECRETARY OF THE TREASURY
FOR MONETARY AFFAIRS,
Washington, D.C., May 2, 1975.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am writing in response to your letter of April 7, 1975, requesting a current report on specific cases arising out of the Arab Boycott and of discrimination against Jewish and other members of the U.S. business community.

As you are probably aware, there were several articles in the press in February about possible discriminatory conditions being attached to certain Arab bank deposits in the U.S. As a consequence, the Comptroller of the Currency sent a letter to all national banks making it clear that such conditions are not acceptable. I am attaching a copy of that letter for your information. We will, of course, continue to be alert to any possible attempts to discriminate against U.S. citizens and will take appropriate action within our authority.

We also understand that the Anti-Trust Division of the Justice Department has opened investigations into possible violations of the anti-trust laws with respect to discrimination within the international investment banking community. I do not have the details of these cases, nor the status of the investigations. You may wish to see if the Justice Department can provide this information, directly.

Finally, the Commerce Department continues to receive reports from American firms of requests of them to supply information to the various Arab Boycott authorities. We understand that in 1974 Commerce received a total of 785 reports, of which 378 indicated that the U.S. firms had supplied the information requested.

You also asked in your letter for any pertinent recommendations I may have. I have received no indications that our existing laws are inadequate to deal with discrimination in the U.S. against members of the Jewish faith. Should this become apparent, however, I would, of course, support the idea of such new legislation.

The boycott issue is a complex one involving both economic and political considerations. It is a key weapon that has been employed by certain Arab nations in their conflict with the Israelis. It is not likely to be eliminated by the Arabs without at least partial resolution of that conflict. The economic effects are also

not entirely within our control, for the Arab nations retain both the right and the flexibility to direct their business to firms of their choosing, whether here or abroad.

I am aware that, nonetheless, there have been a number of legislative proposals to strengthen the provisions of the Export Administration Act. We will carefully review and comment on these at the appropriate time. In framing legislative proposals to deal with the boycott, I think it important not to lose sight of our ultimate objective which is to mitigate the effect of the boycott to the maximum extent possible, and ultimately to achieve its elimination. Legislation which serves neither purpose, or aggravates the situation, should be avoided.

In the meantime the Treasury Department and other agencies will continue to monitor developments arising out of the Arab Boycott and we will take whatever appropriate steps we can to alleviate the effects of the boycott and to bring about its elimination.

I hope this information is helpful. Please let me know if I may be of further assistance.

Sincerely yours,

JACK F. BENNETT.

Attachment.

THE ADMINISTRATOR OF NATIONAL BANKS,
Washington, D.C., February 24, 1975.

To: Presidents of all national banks.
Subject: Discriminatory practices.

This Office has recently learned that some national banks may have been offered large deposits and loans by agents of foreign investors, one of the conditions for which is that no member of the Jewish faith sit on the bank's board of directors or control any significant amount of the bank's outstanding stock. While we are not presently aware of any such deposits or loans, so conditioned, having been accepted by any of the banks under the jurisdiction of this Office, we are concerned that all national banks scrupulously avoid any practices or policies that are based upon considerations of the race, or religious belief of any customer, stockholder, officer or director of the bank.

One of the major responsibilities of this Office is to insure that each national bank meets the needs of the community it was chartered to serve. While observing those credit and risk factors inherent to the banking business, all the activities of all national banks, indeed of all banks regardless of the origin of their charters, must be performed with this overriding principle of service to the public in mind. Discrimination based on religious affiliation or racial heritage is incompatible with the public service function of a banking institution in this country.

By means of its regular examination function, this Office will assure the adherence of national banks to a nondiscriminatory policy in the circumstances mentioned, as well as in any other respect where racial or religious background might similarly be placed in issue. This Office is confident that it has the full understanding and cooperation in this effort of the banks in the national system.

Very truly yours,

JAMES E. SMITH.

APPENDIX D

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., September 19, 1975.

HON. ROGERS C. B. MORTON,
Secretary, Department of Commerce,
Washington, D.C.

DEAR MR. SECRETARY: Enclosed are copies of documents made available to the Oversight and Investigations Subcommittee which suggest that certain American firms may be abiding by Arab requests not to do business with Israel, or with any Israeli citizen, or with any person of Jewish faith and/or with any domestic firm which declines to participate in the same or similar boycott.

The documents appear to be the following:

(1) Contract for a feasibility study for establishing a sponge iron complex at Alexandria, Egypt, which was made in Cairo on July 29, 1974, between an Egyptian firm, three other foreign firms and the [deleted], in which [deleted],

called the "consultant" in the contract, declares that he "does not possess any plant, firm or branch in Israel, that *he does not participate in any firm or company established in Israel and that he has not any supply manufacturing assembling license or technical assistance contract with any firm, company or person established or resident in Israel.*"

(2) Offer to do business from the Chairman of Purchasing Bids and Tender Committee, College of Petroleum and Minerals, Dhahran, Saudi Arabia, dated June 9, 1975, to [deleted] requesting that [deleted] "please do not quote on goods manufactured by companies who are included in the Arab Boycott List, i.e. (BLACKLIST)."

(3) Letter of credit to an American supplier from the Central Bank of Libya, Tripoli, Libya with [deleted], acting as intermediary. The supplier is informed on the letterhead of [deleted] that the sum of $2,219 will be available upon presentation of the supplier's drafts on [deleted] when accompanied with a "declaration duly signed by the exporter or supplier stating the company which produced the commodity to be exported or supplied by him is not an affiliate to or a mother of companies on the Israeli boycott list and stating also that the exporter or the supplier *has no direct, or indirect connection whatsoever with Israel* and will act on the ground and regulations of the Arab boycott of Israel." The date of the advice of confirmed, irrevocable, straight credit is December 18, 1974.

(4) Invoicing instructions from [deleted] to American suppliers indicating that invoices must bear the following certifications:

"We hereby certify that the goods enumerated in this invoice are not of Israeli origin nor do they contain any Israeli materials nor were they shipped on vessels boycotted by the Israeli Boycott Office nor were they designated to visit an Israeli port nor were they exported from Israel," and

"We hereby certify that the goods enumerated in this invoice are of U.S.A. origin. All prices are true and correct."

(5) Letter dated January 27, 1975, from [deleted] acting as agent for the Government Iraq, to [deleted], indicating that the "tendered shall not incorporate in this Tender any equipment or material that may have been manufactured in Israel or *by companies sharing Israeli* capital or boycotted officially, as the import into Iraq of any such equipment or materials or components is officially banned."

(6) Export Purchase Order (January 1975) Shipping and Invoicing Instructions on letterhead of [deleted] Oil Company indicating that "the following certification is required on the Invoice: 'We certify that the goods listed are not of Israeli origin nor do they contain any Israeli maerials.'"

(7) An application for irrevocable letter of credit, dated May 3, 1975 to United Commercial Bank, Hong Kong, to establish an irrevocable letter of credit through their office/agents in New York in favor of [deleted] with L/C to be established in name of [deleted]. Application for the letter of credit says that drafts are to be drawn on sight for 95 percent of invoice value for listed merchandise (jewelry). It says the invoice must certify that "goods supplied are not of Israeli origin neither do they contain any Israeli materials."

In addition to furnishing the Subcommittee with reports of boycott requests filed since 1970 with the Department of Commerce in accordance with Export Control Regulations and a list of all tender offers by foreign governments or firms containing boycott provisions as well as Commerce Department cover letters which may have been attached to them, I am requesting copies of the reports filed since 1970 under the Export Control Regulations by the specific firms underscored above. If they have not filed, please inform us of that fact.

Rule X of House of Representatives assigns to the Committee on Interstate and Foreign Commerce responsibility for "interstate and foreign commerce generally," which includes the administration by the Federal Trade Commission of the FTC Act and other laws and also the Securities and Exchange Commission and its administration of Federal securities law.

Compliance with the boycott requests may violate Section 5(a)(6) of the Federal Trade Commission Act and/or 10(b) of the Securities Exchange Act of 1934. All of the material requested to date by the Subcommittee is pertinent to a Congressional determination of the nature and extent of boycott actions and to a consideration by the Commerce Committee as to whether the laws covering the Federal Trade Commission, the Securities and Exchange Commission and the Commerce Department and their administration are adequate. I request, there-

fore, that you be prepared to tell the Subcommittee, during your appearance on Monday, September 22, what materials, requested and subpoenaed, you will make available to the Subcommittee.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

[Enclosures not printed].

APPENDIX E

GENERAL UNION OF CHAMBERS OF COMMERCE, INDUSTRY & AGRICULTURE FOR ARAB COUNTRIES,
Beirut, Lebanon.

Subject: The Arab Boycott of Israel: Its grounds and regulations.

SIR: It has come to our knowledge that certain Israeli circles, with the aid of world Zionist organizations, are conducting a campaign of misrepresentation against the Arab economic boycott of Israel. Since the Arab States are anxious to maintain the most cordial economic relations with all countries, and since in choosing measures for the inforcement of the boycott against Israel, the Arab States have always been careful that no avoidable loss or damage be caused to their trade with other countries, we are sending you this letter which contains the main facts about the boycott in the hope that they will help to avoid any misunderstanding or loss.

(1) THE ARAB BOYCOTT OF ISRAEL IS A DEFENSIVE MEASURE

You are probably aware that Israel has forcibly expelled one million Arabs from their homes in Palestine, that it has taken over the properties of these Arabs, and is preventing them from returning to their homes: that these refugees are mostly living in camps under conditions of appalling misery, on relief by the United Nations.

You are also probably aware that all this is beind done in defiance of clear resolutions taken by the United Nations—resolutions which call on Israel to allow all refugees to return to their homes and recover their properties.

You must have heard of the raids which have been and are still being made by the regular Israeli forces against frontier Arab villages, with the consequent loss of innocent lives they have caused, and the aggressive war which it undertook in 1956 against Egypt, and which was denounced by sixty five states in the United Nations General Assembly.

The Arabs are certain that the aggressive Zionist state of Israel is planning to expand further at the expense of Arab lands, and to turn more Arabs into refugees. This state even hopes to dominate economically wherever it finds itself unable to dominate politically. Recent events in the Middle East confirm this conviction.

The Arabs are determined to frustrate this plan of aggression. They are determined to defend them selves, their homes and their normal living. They are therefore doing no more than trying to deny Israel that economic power which might enable it to realize a new step in its attempt for the achievement of its distorted dream of domination.

(2) THE ARAB BOYCOTT OF ISRAEL IS NOT INSPIRED BY RACIAL MOTIVES

This boycott is directed against Israel, but not a gainst the Jews. Indeed there are many Jewish citizens in most of the Arab States, who are unmolested and prosperous.

Jewish firms outside Israel receive from the Arabs the same treatment as non-Jewish firms. There is no discrimination. Any firm, irrespective of the creed or race of its owners, shareholders, or managers will be able to deal with Arab countries, so long as it does not breach the regulations of the Arab boycott of Israel.

(3) THE ARAB BOYCOTT OF ISRAEL CAUSES NO LOSS OR DAMAGE TO OTHER COUNTRIES

This must be obvious. The Arabs are important consumers, for they are rich in purchasing power derived from oil revenues and other sources, whereas their productive capacity is relatively small. Whatever they do not import from Israel, they have to import from other countries. When Israel tries to induce other countries to help in breaking the Arab boycott, it simply aims to acquire for itself these Arab markets which had so far been open to others. Remember, therefore, that Israel is the only loser and that it can recover this loss only at your expense.

However, if no loss is caused to any country, loss may well be caused to individual firms. This can happen only when such firms cause themselves to be blacklisted by breaching the regulations of the Arab boycott; but such loss is easily avoidable. The rules themselves are reasonable, and besides, the Arab markets are immensely bigger, and they have immeasurally greater prospects than those of Israel. Israel, despite all the publicity offers very few opportunities for lucrative business.

(4) THE RULES AND REGULATIONS OF THE ARAB BOYCOTT ARE REASONABLE AND CLEAR

Considering the above, it may be asked what are the rules and regulations of the Arab economic boycott? Generally, the boycott regulations, which are non-restrictive to the freedom of international trade by their very nature, do not apply to companies which have normal dealings with Israel involving the sale of completely manufactured goods—of wholly non-Israeli manufacture—in Israel. However, these regulations do apply to all companies, irrespective of their nationality, which engage themselves in the following practices:

(I) Manufacturing and trading companies

(A) If they have main or branch factories in Israel.

(B) If they have assembly plants in Israel. This also applies to foreign firms and companies whose agents assemble their products in Israel.

The ban will be applied too in the case of assembly if it is proved that a certain Israeli company has assembled, on a commercial scale, a unit of a certain product or goods from parts the majority of which is produced by a certain foreign company or any of its branches/subsidiaries, unless such foreign company establishes its non-responsibility for such assembly, and takes legal proceedings against the Israeli company which committed the assembly. This provision is applied if the parts used in producing the unit constitute more than 50% of the parts of such unit, or if the engine of the unit is of the foreign company's production.

(C) If they maintain in Israel either general agencies or main offices for their Middle Eastern operations.

(D) If they give the right of using their names or manufacturing licensees to Israeli companies.

(E) If they hold shares in Israeli companies or factories.

(F) If they render consultative services and technical experience to Israeli factories.

(G) If they, or their directors or managers, are members of joint foreign-Israeli chambers of commerce.

(H) If they act as agents for Israeli companies or principal importers of Israeli products, outside Israel.

(I) If they take part in prospecting for natural resources within Israel such as petroleum drilling.

(J) If they decline to answer the questionnaire addressed by Arab authorities requesting them to provide explanation of the nature of their relations with Israel in order to determine whether they constitute a violation or not.

(K) If, after serving notice on them and granting them a grace period of not less than six months, during which to substitute the products of blacklisted companies with products of other companies which are not violating the Boycott principles, they use in their own products articles or machines produced by a

blacklisted company. During the period of notice, the products of such companies may be allowed entry provided that their position is clear in regard to other Boycott regulations, and that parts produced by the blacklisted company and used in the company's products do not exceed 35% of the total cost of the finished unit.

The ban imposed on a certain company is applied against all of its parent and subsidiary companies. It is permissible, however, to waive, for once only, the ban imposed on a blacklisted company if it arranges to redress the violation of rules enforced in the Arab countries and presents documentation to this effect.

(II) Foreign navigation companies

(A) Foreign ships, tankers and other maritime transportation means shall be blacklisted if they engaged in any of the following acts:

(1) If it was proven that they called on an Arab port and an Israeli port in the same round trip; universal tourist ships being excluded.

Tourist ships denotes those ships which carry tourists only, and not ordinary passengers, and which do not load or offload goods from and to the countries they call on. Companies which own or charter these ships shall inform the competent Regional Boycott Office of the routes and timetables of those ships in due course.

(2) If they transport materials or articles helpful to the war effort of Israel even if they do not call on an Arab port and an Israeli port on the same round trip.

(3) If they are chartered to Israeli companies or institutions.

(4) If they transport industrial, commercial or agricultural Israeli products.

(5) If they transport Jewish immigrants to Israel.

(6) If they refrain, within a maximum period of 15 days notice, from presenting the manifests of shipments they unloaded at Israeli ports on a previous trip.

(B) A ship or tanker may be lifted from the blacklist if its owners undertake to refrain from violating the above rules again. This is not applicable to ships flying the Israeli flag or previously enjoying the Israeli nationality.

(C) Transactions shall be banned with any foreign navigation company if it is established that such a company has chartered any ship or tanker owned or chartered by it to an Israeli firm, company or institution with the intention of creating an international crisis involving any Arab country. The ban entails the blacklisting of all vessels owned, or chartered by such company.

(III) Foreign banks dealing with Israel

Transactions with foreign banks are banned if they commit any of the following acts:

(A) If they give loans or subsidies to Israeli public or private firms and/or institutions which may help them in carrying out major military, industrial or agricultural projects.

(B) If they take active part in distributing and/or promoting Israeli loan bonds.

(C) If they establish firms or companies in Israel.

(D) If they subscribe to the establishment of firms or companies of Israeli capitals, either inside or outside Israel.

(IV) Foreign motion pictures' companies and actors

(A) Movie and television films: The projection of foreign films in whatever copy or language is prohibited in all Arab countries in the following cases:

(1) If the film, in story, script and content, is intended to distort Arab past or present history in regard to religion or nationality.

(2) If the film, in story, script and content, is intended to promote Israeli or Zionist propaganda aims.

(3) If the film is featuring actors enjoying Israeli nationality.

(4) If the film is wholly or partially photographed in Israeli or if it is of Israeli-foreign production.

(5) If the film features foreign actors or actresses whose Zionist tendencies are established.

(B) Foreign motion pictures' and television companies: Transactions shall be banned with motion pictures and television companies the Zionist tendencies of which or their acting for the interests of Israel are proven. This provision is applicable in the following cases:

(1) If they, in spite of communicating with them in order to make them aware of the measures their actions entail, again produce films intended in story, script and content to distort past or present Arab history in regard to religion or nationality.

(2) If they, in spite of communicating with them in order to make them aware of the measures their actions entail, repeat their donations to Israel, in their capacity as artificial persons, in a way indicating their bias and acting for the interests of Israel.

(3) If they, in spite of communicating with them in order to make them aware of the measures their actions entail, again produce films intended in story, script and content to make propaganda for Israel.

(4) If they, in spite of communicating with them in order to make them aware of the measures their actions entail, again produce joint foreign-Israeli films and refuse, without reasonable motives, the production of joint foreign-Arab films of a similar character.

(5) If they establish in partnership with Israeli capital or subscribe with Israeli capital to the establishment of firms or companies inside or outside Israel; if they establish manufacturing branches in Israel; or if they render consultative services and technical assistance to Israeli firms or companies.

(*V*) *Foreign insurance companies*

Transactions shall be banned with foreign insurance companies the subscription of which an industrial, commercial or other firms and companies in Israel is proven, and as a result of which they exceed their normal activities.

(*VI*) *Foreign agencies of Arab companies*

Firms and companies enjoying the nationality of any Arab country may not give their general agencies to foreign aviation and shipping companies or firms if it is proven that the latter are general agents of Israeli firms or companies abroad. This provision is applied in case the local laws of the country concerned do not prohibit such actions.

(*VII*) *Foreign shipbuilding companies*

Transactions shall be banned with foreign shipbuilding companies which, after communicating with them in order to make them aware of the fact that building ships for Israel by them promotes the economy and the war effort of Israel, again build ships or tankers for Israel.

* * *

While presenting to you these facts and regulations, it gives us great pleasure to assure you of our best attention and cooperation, and our express willingness to answer any questions which you may have regarding the Arab economic boycott of Israel.

Faithfully yours,

ABDUL AZIZ H. AL SAGER, *President.*

APPENDIX F

SAMAWAH CEMENT PUBLIC COMPANY, P.O. BOX No. 5—SAMAWAH, IRAQ

GENERAL TERMS & CONDITIONS

(1) *Technical specifications*

The tender documents submitted by the Tenderer shall include the following:—

a-Full description and detailed specification of offered goods.

b-Other pertaining information such as Catalogues, pamphlets Analysis, Samples if requested, Standards etc.

(2) *Weights & prices:*

Tenders should be itemized as far as possible giving nett and gross weights. Itemized FOB prices should be given.

Estimated freight charges and total C & F prices to Basrah and Baghdad should also be stated.

Currency should be of that of Country or Origin of goods. Type of packing: Suitable for export, details should clearly be stated.

(3) *Validity:*

The validity period of the tender submitted should be not less than 3 months from closing date of submission of tender, confirming firm rate.

(4) *Terms of payment: Insurance & Letter of Credit*

Both letters of Credit & Insurance shall be effected by Samawah Cement Public Company.

(5) *Neutral Tests:*

Offers are to include an acceptance statement to the effect that Samawah Cement Public Company, may appoint a competent Neutral party at its expense to inspect material in order and issue relevant test certificate to the effect that the material being shipped conform in all respects with the agreed upon specifications. Bankers effected payment will only do so upon receiving a copy of such certificate which have been approved by Samawah Cement Public Company.

(6) A complete set of documents issued with each tender may be Purchased by any person desiring to participate in the confidential tender, against payment of an amount fixed by the Company for each tender.

This amount is not refundable under any circumstances.

(7) The closing date of submission of tender will be not later than closing office hours on 31/3/75.

Tenders received after this time and date shall not be accepted.

(8) The Company does not bind itself to accept the lowest tender.

(9) Tenders not complying with our specifications and terms shall be neglected.

(10) Tenders should be submitted in six copies.

(11) Tenders are to be submitted in sealed envelopes, clearly indicating subject of tender, Samples if required should be sent under separate cover marked clearly with the reference number and subject of tender.

(12) Tenders are to be accompanied by a preliminary bank deposit in favour of and payable to the Samawah Cement Public Company for the sum of 5% of the FOB value of offer as a guarantee of good faith. The deposit will be returned to unsuccessful. Tenderer after 6 Calendar months from closing date of tender.

(13) *Certificate of Origin:*

Tenderer must submit:

(a) Certificate of origin specifying that the goods are not of Israeli Origin not the Company having a branch in Israel and that they will not be shipped on Israeli or Black listed Vessels. This Certificate must be legalized by the Iraqi or any Arab Consulate or representative and in case of their non-existence, legalization by Chamber of Commerce or Industry in the Country of Origin or port of Shipment will suffice.

(b) Country or origin and port of shipment of goods.

(c) Delivery period.

NOTES

On acceptance of an offer, Samawah Cement Public Company will require the following:

(a) *Bank Guarantee*

Such a guarantee is requested by Samawah Cement Public Company its amount will not exceed 5 percent of FOB value of offer and should be valid six months after the date of last shipment.

(b) *Proforma Invoice*

Confirmation of order is to be accompanied with 10 copies of proforma Invoice.

(c) *Validity of L/C*

Due to the regulations of the Central Bank of Iraq, L/C can not be opened for more than a period of 5 months, however, in case of the delivery period being greater than eight months the L/C will be extendable prior to expiry date to cover the full period delivery time.

(d) *Shipping Marks*

Shipping marks to be mentioned on shipping documents as follows:

Samawah Cement Public Company.
Samawah Works
Order No.

(a) If the Tenderer fail to deliver the material in accordance with the conditions, the Samawah Cement Public Company shall cash the bank guarantee submitted by the Tenderer.

APPENDIX G

U.S. DEPARTMENT OF COMMERCE,
DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION,
Washington, D.C.

GENTLEMEN: The following trade opportunities have been submitted to the Department of Commerce by U.S. Foreign Service Posts overseas.

If you are interested in any of these opportunities, please contact directly the person listed on the enclosed telegrams.

Sincerely,

CHARLES B. PITCHER
Construction and Building Materials Program,
Office of Business of Research and Analysis.

Enclosure:

MINISTRY OF INDUSTRY & METALS, STATE ORGANIZATION FOR ENGINEERING INDUSTRIES, HOUSING SCHEMES COMMITTEE

TENDER NO. 6/75—3550 PRECAST HOUSES

Technical Specifications

1. Scope of the tender: 3550 houses precast concrete to be established in the following areas: 1300 houses in Baghdad located as follows: 700 houses in Waziriyah, 500 houses in Aba Ghraib, 100 houses in Al-Taji.

1000 houses in Iskandariyah, 400 houses in Diyala, 100 houses in Kut, 150 houses in Hassiriyah, 600 houses in Dasrah.

2. Precasted concrete buildings are preferred to precasted concrete houses.

3. In case of buildings, they will be of three floors only with 36–48 apartments in each building.

4. Individual houses to be of about 80 square meters each with a garden of 70 square meters, suitable for five persons to live in and consist of: 2 Bedrooms, 1 living room, 1 Hall, 1 Kitchen, 1 bathroom with shower and 1 W.C. of oriental type to be separated from the bathroom.

5. In case of individual houses, the roof will be level to enable inhabitants to use it as a sleeping place in summer nights and there should be inside staircase for this purpose.

6. Each house in Basrah area should be equipped with airconditioning unit and in case of buildings, the building should be centrally airconditioned. As for houses/buildings in other areas, they should be equipped with ducting system for desert coolers.

7. Each house should be equipped with oil heater for hot water.

8. All rooms should be equipped with electrical points for ceiling fans.

9. Offers should include all utilities for housing schemes in each group of houses, i.e. primary school, market, social centre, medical centre, etc.

10. Any other suitable alternative will be taken into consideration.

MINISTRY OF INDUSTRY & METALS, STATE ORGANIZATION FOR ENGINEERING INDUSTRIES, HOUSING SCHEMES COMMITTEE

TENDER NO. 6/75—3550 PRECAST HOUSES

General Terms and Conditions

1. Offers should be based on C&F site or Baghdad taking into consideration that insurance to be effected locally at the supplier's cost.

2. Full specifications, type and make of the material offered should be given as well as country of origin.

3. Materials supplied by the tenderer should comply with the agreed upon specifications and conditions as in concluded contract.

4. Offers in three copies to be submitted in sealed envelope and addressed to State Organization for Engineering Industries with the name and number of the tender written clearly on the envelope.

5. Offers should be submitted to above at least 12:00 hours of the closing date of the tender and any offer received after that date will be neglected.

6. If tenders sent by post, they should be registered but the tenderer must make sure that offers are delivered to the said office within the limited time.

7. The tenderer must submit a preliminary deposit with the tender as a security of his financial standing and as a guarantee to perform his obligations

under the contract conditions in a form of bank guarantee issued by Rafideia Bank, amount of which should not be less than 5% of the total value of the tender and it should be valid for two months after the closing date.

8. In case of the successful tenderer, the bank guarantee will be retained until the tender has been definitely accepted. Thereafter deposits shall be returned to the unsuccessful tenderers

9. After the reward of the tender to the successful tenderer, the above bank guarantee will be released and replaced by a performance Bank Guarantee amounting to 5% of the contract tender for a period ending with one month after the Final Acceptance Certificate date.

10. The contractor will be responsible of the maintenance of the houses and all other utilities for one calendar year effective the date of the Final Acceptance Certificate and for that purpose a bank guarantee of 5% of the contract value should be submitted from that date until the end of the maintenance period.

11. Payment: Payment shall be effected by establishing a letter of credit in the name of the supplier to the value of 100% of the total tender value payable in installments related with the progress of the shipping and erection progress.

12. Penalty: If the tenderer fails to deliver the material in accordance with conditions agreed upon the SOEI shall cash the Bank Guarantee submitted by him and shall deduct the amount that shall be calculated on the basis of damage caused to this Organization as a result of unsatisfactory quality.

13. Country of Origin: The tenderer should not incorporate this tender any material that has been manufactured in Israel or by companies boycotted officially by Iraqi Government.

14. Validity: Offers should be firm and valid for 60 days after the closing date of the tender.

15. If the tenderer withdraws his tender before the expiry date of 60 days period, his provisional deposit will be forefeited to SOEI.

16. The SOEI does not bind itself to accept the lowest offers or any other offer and without being liable to assign any reason thereof.

APPENDIX H

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., July 10, 1975.

MR. RAUER MEYER,
Director, Office of Export Administration, Department of Commerce, Washington, D.C.

DEAR MR. MEYER: Thank you for your recent assistance to the Subcommittee on Oversight and Investigations preliminary research on the Arab boycott.

As you probably know, the Subcommittee is seeking information on American firms that have encountered or have been influenced by boycott demands. Since Part 369.2 of the Export Control Regulation requires any U.S. exporter who receives a request for boycott compliance to file a quarterly report with the Office of Export Control, the Subcommittee and its staff will require access to these reports.

Please send us copies of all reports from 1970 to the present by July 21, 1975.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigation Subcommittee.

* * *

THE SECRETARY OF COMMERCE,
Washington, D.C., July 24, 1975.

HON. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of July 10, 1975 to Mr. Rauer H. Meyer, Director, Office of Export Administration, in which you requested access to boycott requests reported to this Department since 1970.

Under the Export Administration Act of 1969, as amended (the "Act"), and our implementing regulations, domestic exporters are required to report to this

Department any requests they receive to cooperate with the Arab boycott. I am enclosing for your information a copy of the form prescribed for reporting such boycott requests, together with a reprint of the pertinent part of our regulations. You will note that these regulations do not prohibit U.S. firms from participating in the boycott. Rather, the action with respect to which sanctions may be imposed under the regulations is *failure to report* the *request* for their participation.

On three occasions, the Department has conducted widespread publicity campaigns in an effort to make certain that exporters were aware of the law and their responsibility to report. The first campaign followed immediately upon enactment of the legislation in 1965 and carried over into 1966. Another intensive campaign was launched in 1968 and carried over into 1968. The most recent publicity campaign, which began in April of this year, included direct mailings to some 30,000 U.S. firms engaged in international trade of a copy of the pertinent parts of our Export Administration Regulations dealing with the reporting of Arab boycott requests.

I believe that the effectiveness of this publicity campaign can be measured by the fact that as of June 26, 898 boycott requests have been reported during 1975, as compared to only 785 such requests reported during the entire calendar year 1974.

In the course of our investigation in 1968, eighteen firms, because of ignorance or misunderstanding, were found not to be complying with the reporting requirements and were warned to do so thereafter. During a follow-up investigation in April of this year, five of these same firms were found to have failed to report subsequent boycott requests. These were charged with violating our export administration regulations, and compliance proceedings against four of these five firms are now successfully completed. Section 388.14 of our regulations provides for the confidentiality of these proceedings until such time as a sanction is imposed. I am enclosing for your information a copy of the Department's press release of June 27, which identifies these four firms and gives details regarding their violations. To date, warnings have been issued to 105 other firms which were "first-time offenders."

Your request that we make available to your Subcommittee and its staff, copies of all the boycott reports which have been submitted to us since 1970 must be considered under the provisions of Section 7(c) of the Export Administration Act of 1969, as amended, because these reports were submitted to this Department pursuant to the Act under an express pledge of confidential treatment. Section 7(c) of the Act provides that:

"No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, *unless the head of such department or agency determines that the withholding thereof is contrary to the national interest.*" (Emphasis added.) (50 U.S.C. App. § 2406(c))

Thus, the Act does not merely authorize the President or his delegate to maintain the confidentiality of information obtained under the Act "which is deemed confidential or with reference to which a request for confidential treatment is made," but *requires* that such information not be disclosed unless the agency head determines that its withholding is "contrary to the national interest." You will notice that the enclosed copies of Form DIB-621 and § 369.2 of the Regulations expressly advise the exporter that the information contained in his reports will be deemed confidential under Section 7(c). Thus, the identity of individual reporting firms and the particular information submitted by them are specifically exempted from disclosure by statute.

In considering whether there is an overriding national interest in disclosing the identity of these individual reporting firms, I am mindful of the need to provide Congress with adequate information on which to legislate. There is undoubtedly a national interest in the Congress and the public being aware of the number of transactions, as reported to this Department, in which U.S. firms had been asked to cooperate in restrictive trade practices by various countries. This information has been reported by this Department in our Quarterly Reports on Export Administration to the Congress. Furthermore, the enclosed summary of boycott information reported by exporters through June 26, 1975, shows the types of restrictive trade practices which were reported and the actions the exporters indicated they would take in response. I hope you will find this summary sufficient for your needs, as it contains in aggregate form virtually all the information found on the exporter reports. However, disclosing the identity of reporting firms would accomplish little other than to expose such firms to possible economic retaliation by certain private groups merely because they

reported a boycott request, whether or not they complied with that request. Such a consequence would not, in my view, be in the national interest. Accordingly, I must decline the request set forth in your letter.

I want to stress, however, that I am fundamentally opposed to the premises upon which the Arab boycott is based, and sincerely hope that a resolution of the issue satisfactory to all concerned can be achieved as quickly as possible.

Sincerely,

ROGERS MORTON,
Secretary of Commerce.

Enclosures.

U.S. DEPARTMENT OF COMMERCE
Domestic and International Business Administration
BUREAU OF EAST-WEST TRADE
OFFICE OF EXPORT ADMINISTRATION
WASHINGTON, D.C. 20230

BOYCOTTS OR OTHER RESTRICTIVE TRADE PRACTICES IMPOSED BY FOREIGN COUNTRIES

NOTICE TO EXPORTERS

There is reason to believe that a number of firms, perhaps through lack of knowledge or misunderstanding, may not be complying with the Department of Commerce regulations regarding the reporting of requests for information or action in support of certain foreign restrictive trade practices or boycotts.

The Department's regulations are reprinted in this pamphlet. I urge that you review the provisions of this regulation. If you receive any such requests that are reportable, you are required by law to report them. Failure to report subjects you to the penalties prescribed in Section (6) of the Export Administration Act of 1969, as amended.

Rauer H. Meyer
Director, Office of Export Administration

REPRINTED FROM Export Administration Regulations June 1, 1974

§ 369.1

GENERAL POLICY

It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against any country not included in Country Group S, W, Y, or Z.[1] All exporters engaged in the export from the United States of articles, materials, supplies, or information, including technical data (whether directly or through distributors, dealers, or agents), are encouraged and requested to refuse to take (but are not legally prohibited from taking) any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.

§ 369.2

REPORTING REQUIREMENT

(a) Scope

In order to implement the policy set forth in § 369.1 above, a reporting requirement

[1] Country Groups appear on page 3.

is established. The provisions of this § 369.2 apply to any U.S. exporter who receives a request for an action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting a restrictive trade practice or boycott fostered by any foreign country against any country not included in Country Group S, W, Y, or Z. (See § 369.3 for examples of restrictive trade practices or boycotts.) Where such request is received by any other person handling any phase of the transaction for the exporter, that person (forwarding agent, etc.) is responsible for informing the exporter of the request so that the latter may report it.

(b) *Report from U.S. Exporter*[1]

Any U.S. exporter who receives a request, or is informed of a request, relating to a restrictive trade practice or boycott, as described in paragraph (a) above, shall report the request to the Office of Export Administration (Room 1617M), U.S. Department of Commerce, Washington, D.C. 20230. The exporter's report may be submitted in accordance with the procedure set forth in either paragraph (1) or (2) below. (The information contained in these reports is subject to the provisions of Section 7(c) of the Export Administration Act regarding confidentiality of information.)

(1) **Single transaction report.** If the report covers only a single transaction it shall be submitted to the Office of Export Administration within fifteen business days from the date the exporter receives the request. This report shall be made on U.S. Exporter's Report of Request Received for Information, Certification, or Other Action Indicating a Restrictive Trade Practice or Boycott Against a Foreign Country, Form DIB-621 or IA-1014[2] (see back page for facsimile of form). If the request is for information and is received in the form of a questionnaire, a copy of this questionnaire shall accompany the report. Copies of requests received in other forms need not be submitted with the report, but appropriate quotations from the request shall be included in the report. Whenever an exporter receives more than one request for action with reference to the same export transaction, only the first request need be reported.

(2) **Multiple transactions report.** Instead of submitting a report for each transaction regarding which a request is received, the exporter may submit a report covering all transactions regarding which requests are received from persons or firms in a single country during a single calendar quarter. This report shall be made by letter to the Office of Export Administration no later than the fifteenth day of the first month following the calendar quarter covered by the report. If the exporter has received requests from persons or firms of more than one foreign country, a separate report shall be submitted for each country. Each letter shall include the following information:

(i) Name and address of U.S. exporter submitting report;

(ii) Calendar quarter covered by report;

(iii) Name of country(ies) against which the request is directed;

(iv) Country of requester;

(v) Number of transactions to which restrictions were applicable;

(vi) Type(s) of request(s) received. (If questionnaire, attach copy. If other than questionnaire, give the type of document or other form of request and the specific information or action requested.);

(vii) General description of the types of commodities or technical data covered and the total dollar value thereof; and

(viii) Whether or not the U.S. exporter intends to comply with the request(s). (Submission of the information required by this § 369.2(b)(2)(viii) would be helpful to the U.S. Government but is not mandatory.)

[1] See § 369.2 for definition of U.S. Exporter.

[2] Copy of Form DIB-621 may be obtained at any U.S. Department of Commerce District Office and from the Office of Export Administration (Room 1617M), U.S. Department of Commerce, Washington, D.C. 20230.

§ 369.3

EXAMPLES OF REQUESTS RELATED TO RESTRICTIVE TRADE PRACTICES OR BOYCOTTS

A request which promotes or upholds a re-

strictive trade practice or boycott may be received by U.S. exporters in the form of general questionnaires to be answered, specific statements or certifications to be supplied in particular transactions, or other types of requests for action. Shown below are examples of requests that could indicate the furthering or supporting of restrictive trade practices or boycotts. This is not to be interpreted as being a comprehensive list.

(a) A request for information as to whether the U.S. exporter or any subsidiary or affiliate of the U.S. exporter has, or intends to have, any stockholders, owners, employees, or officers who are nationals of a boycotted country.

(b) A request for information as to whether the U.S. exporter or any subsidiary or affiliate of the U.S. exporter has, or intends to have, any stockholders, owners, employees, or officers who are members of a religious organization or of a race, creed or color generally associated with a boycotted country.

(c) A request for information as to whether the U.S. exporter or any subsidiary or affiliate of the U.S. exporter has, or intends to have, any business relationship with a boycotted country or a national of a boycotted country. These business relationships include, but are not limited to, trade in commodities or technical know-how, licensing arrangements, advertising or promotion of sale of goods originating in a boycotted country, or use of such goods as components in a manufacturing process.

(d) A request for information as to whether the U.S. exporter or any subsidiary or affiliate of the U.S. exporter does any business, or intends to do any business, with any firm that has a business relationship with a boycotted country or a national of a boycotted country.

(e) A request for information as to whether the U.S. exporter or any subsidiary or affiliate of the U.S. exporter has any investments, including branches, subsidiaries, affiliates, or holdings, or any commercial or legal representation in a boycotted country, or a business firm located in, or doing business in, a boycotted country.

(f) A restriction prohibiting the U.S. exporter or any subsidiary or affiliate of the U.S. exporter from using shipping or transportation facilities that are "blacklisted" by the importing country. (However, a request or restriction solely precluding the export of commodities to the importing country on (1) shipping or transportation facilities owned, controlled, operated, or chartered by a country or a national of a country friendly to the United States but not friendly to the importing country, or (2) a carrier that stops at a port in a country friendly to the United States but not friendly to the importing country prior to stopping at the port of unlading, is not deemed a restrictive practice within the meaning of Section 2(4) of the Export Administration Act, but rather a precautionary measure to avoid any risk of confiscation of the commodities. Accordingly, these two types of shipping restrictions are exempted from the reporting requirement of this section.)

§ 369.4

EFFECT OF OTHER PROVISIONS

Insofar as consistent with the provisions of this Part, all of the provisions of the Export Administration Regulations, including Parts 387 and 388, apply equally to the reporting requirement set forth in § 369.2 above. Attention is called particularly to the provisions of § 387.11 under which pertinent records must be kept and made available for inspection for a two-year period.

For export control purposes all foreign destinations (excluding Canada) are divided into seven country groups:

Group S	Southern Rhodesia.
Group T	All countries of the Western Hemisphere (excluding Canada and Cuba).
Group V	All countries not elsewhere listed (excluding Canada).
Group Q	Romania.
Group W	Poland.
Group Y	Albania, Bulgaria, Czechoslovakia, East Germany (German Democratic Republic and Soviet section of Berlin), Estonia, Hungary, Latvia, Lithuania, Outer Mongolia, the People's Republic of China, and the U.S.S.R.
Group Z	North Korea, Communist-controlled areas of Vietnam, and Cuba.

FORM DIB-421
(REV. 4-73)
(FORMERLY IA-1014)

U.S. DEPARTMENT OF COMMERCE
DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION
BUREAU OF EAST-WEST TRADE
OFFICE OF EXPORT CONTROL
WASHINGTON, D.C. 20230

Form Approved.
Budget Bureau No. 41-R2305

U.S. EXPORTER'S REPORT
OF REQUEST RECEIVED FOR INFORMATION, CERTIFICATION, OR OTHER ACTION INDICATING A RESTRICTIVE TRADE PRACTICE OR BOYCOTT AGAINST A FOREIGN COUNTRY

A. **IMPORTANT.** It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take, but are not legally prohibited from taking, any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.

Accordingly, I encourage and request individuals and firms receiving such requests to refuse to comply with them.

Secretary of Commerce

B. INSTRUCTIONS. This form must be completed by a U.S. exporter whenever a request for any action, including the furnishing of information or the signing of an agreement, which is designed to support a restrictive trade practice or boycott fostered or imposed by a foreign country against any other country not included in Country Group S, W, Y, or Z. (Country Groups are listed in Supplement No. 1 to Part 370 of the U.S. Department of Commerce Export Control Regulations.) **Submission of this form is mandatory (50 USC App. 2403(b). Failure to comply subjects the U.S. exporter to the penalties prescribed in Section (6) of the Export Administration Act of 1969, as amended.** It must be submitted to the U.S. Department of Commerce, Domestic and International Business Administration, Bureau of East-West Trade, Office of Export Control, Washington, D.C. 20230, within **fifteen business days** from the date of receipt of such a request. Wherever a person receives more than one request for action with reference to the same transaction, only the first request need be reported to the Office of Export Control (See Part 369 of the Export Control Regulations).

C. **CONFIDENTIAL.** Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in Section 7(c) of the Export Administration Act of 1969 (50 USC App. 2406(c)).

1. Name and Address of U.S. Exporter submitting this report:

Name:

Address:

City, State, and Zip Code:

2. Exporter's Reference No. (If any):

3. Name of Country (ies) against which the request is directed:

4. Date request was received by me us:

5. I/We received this request from:

Name:

Address:

City and Country:

6. Specify type of request received. (If any item in 6b is checked, complete Item 7)

a. ☐ Questionnaire (Attach copy)

b. ☐ Other type of request for information or action contained in:

☐ Trade Opportunity ☐ Certificate of Origin ☐ Consular Invoice
☐ Bid Specification ☐ Certificate of Manufacture ☐ Other (Specify) _____
☐ Purchase Order ☐ Letter of Credit

7. If Item 6b above is checked, give the specific information or action requested. (Use direct quotations from the request.)

8. If the request relates to a specific transaction, describe the commodities or technical data involved. (The description of the commodity or technical data may conform to the description on the order or to usual commercial terminology, and may but need not be in terms of the Commodity Control List or Schedule B.)

Quantity	Description	Value

9. Additional Remarks:

10. Action (Completion of the information in this item would be helpful to the U.S. Government but is not mandatory.)

a. ☐ I/We have not complied and will not comply with the request for information or action described above.

b. ☐ I/We have complied with, or will comply with, the request for information or action described above.

c. ☐ I/We have not decided whether I/We shall comply with the request for information or action described above and I/We will inform the Office of Export Control of my/our decision.

11. I certify that all statements and information contained in this report are true and correct to the best of my knowledge and belief.

Sign here in ink _____ Type or print _____ Date _____

(Signature of Person Completing Report) (Name and Title of Person whose Signature Appears on the Line to the Left)

USCOMM-DIB-P73

* * *

THE SECRETARY OF COMMERCE,
Washington, D.C., August 22, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I am enclosing, for your information, a copy of my letter to Congressman Harley O. Staggers, Chairman, Committee on Interstate and Foreign Commerce, in response to his subpoena of July 28, 1975 directing me to appear on September 4, 1975 before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce.

Sincerely,

ROGERS MORTON,
Secretary of Commerce.

Enclosure.

THE SECRETARY OF COMMERCE,
Washington, D.C., August 22, 1975.

Hon. HARLEY O. STAGGERS,
Chairman, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your subpoena of July 28, 1975, directing me to appear at 10:00 a.m., on September 4, 1975, before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, to deliver all reports filed since December 31, 1969 with the Office of Export Administration of the Department of Commerce pursuant to Section 369.2 of the Export Administration Regulations (15 CFR § 369.2).

As you know, I declined to make these documents available to the Subcommittee on Oversight and Investigations for the reasons which I detailed in my letter of July 24, 1975 to Chairman John E. Moss (copy enclosed). Since receipt of your subpoena, we have carefully reconsidered the grounds which led me to decline the request by Chairman Moss, and have conferred with the Department of Justice concerning the legal issues raised.

I want to stress that I have the utmost respect for the Congress and for the House of Representatives of which I was a member for many years. I recognize the need of Congress to receive from the Executive Branch information necessary to carry out its legislative responsibilities. At the same time, the Congress itself has provided in Section 7(c) of the Export Administration Act of 1969, as amended, that information deemed confidential under that provision may not be disclosed unless I personally determine that the withholding of such information would be contrary to the national interest.

After considerable reflection, I continue to believe, for the reasons given in my July 24 letter, that withholding the requested documents would not be contrary to the national interest, and, in fact, that their disclosure might well be inconsistent with the national interest. Firms reporting pursuant to Section 369.2 of the Export Administration Regulations were expressly advised that the information contained in their reports was deemed confidential and would not be disclosed. These reports contain details of specific transactions. The reporting firms could be injured if their competitors gained access to such commercial proprietary information. Moreover, disclosure of the identity of such firms might expose them to economic pressures and counter boycotts by certain domestic consumer groups. In short, in the absence of an overriding national interest to be served by the disclosure of these documents, such disclosure is clearly not justified under the terms of Section 7(c) of the Export Administration Act. There is undoubtedly a national interest in disclosing to the Congress and the public, the number of reports received, the types of restrictive trade practices involved and the actions which the reporting firms have indicated they intended to take in response thereto. Such summaries are regularly published in our Quarterly Reports to the Congress and are made available to the public. However, I cannot perceive any national interest to be served by disclosing the identity of the reporting firms and the commercial proprietary information contained in their reports. I should reiterate that I do not base my position on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress.

In an effort to cooperate to the greatest extent permissible with the Subcommittee on Oversight and Investigations, I am prepared to make copies of the requested documents available, subject only to deletion of any information which would disclose the identity of the firms reporting, and the details of the commercial transactions involved. I would appreciate your advising me at your earliest opportunity whether or not this partial disclosure would be satisfactory.

I would also inquire whether my appearance before the Subcommittee on Oversight and Investigations is still desired, in light of the tender set forth above. I will, of course, appear if that is your wish, but must respectfully decline to produce the documents without the aforementioned deletions having been made. If my appearance is still desired, I would request that it be postponed until a convenient time during the week of September 8, in view of my longstanding commitment to be with the President on the West Coast during the first week in September.

Sincerely,

ROGERS MORTON,
Secretary of Commerce.

Enclosure [see p. 152]

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., September 2, 1975.

Hon. ROGERS MORTON,
Secretary of Commerce,
Washington, D.C.

DEAR MR. SECRETARY: I have read with great care your letter of August 22, 1975, concerning the subpoena issued to you by the Subcommittee on Oversight and Investigations. That subpoena calls for the production of reports filed with the Department of Commerce in accordance with the Export Administration Act of 1969. In the event you do not intend to surrender the subpoenated documents, your appearance before the Subcommittee is called for on September 4.

I am enclosing a copy of a Subcommittee publication which includes selected provisions of the Rules of the House of Representatives and other provisions applicable to the activities of the Subcommittee. You will note that as the legislative oversight arm of the House Committee on Interstate and Foreign Commerce this Subcommittee's jurisdiction, in addition to "interstate and foreign commerce generally," includes oversight responsibility for the Federal Trade Commission and the Securities and Exchange Commission and the statutes which those agencies administer. Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce. . . ." The provisions of the Securities Exchange Act of 1934 are also applicable. The Subcommittee has requested the "boycott reports" for the purpose of performing its legislative oversight responsibilities in accordance with the Rules of the House.

In your letter, you indicate that in reliance upon section 7(c) of the Act you do not intend to make the reports available to the subcommittee, at least without the deletion of significant information. The statute, of course, does not deny access to Congress. You apparently, however, read the statute to mean that furnishing the reports to Congress is tantamount to "publishing or disclosing" and, therefore, prohibited by law. I cannot agree with that interpretation.

This matter is of such an important nature that it must receive the careful consideration of all the Members of the Subcommittee. I shall bring this to their attention at the earliest possible time. Meanwhile, your request for a postponement of your appearance until a convenient time during the week of September 8 is granted. Members of the Subcommittee staff will contact your office as soon as possible to arrange a suitable date for your appearance.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

[Enclosure not printed.]

* * *

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., September 9, 1975.

Hon. ROGERS MORTON,
Secretary of Commerce,
Washington, D.C.

DEAR MR. SECRETARY: Reference is made to my letter of September 2, 1975, responding to your letter of August 22, 1975. In that letter your request for a postponement of your appearance in response to Subpoena 94-1-56 of this Subcommittee issued July 28, 1975, was granted.

This will confirm the telephone conversation of Mr. Michael R. Lemov, Chief Counsel of the Subcommittee, and Mr. James M. Sparling, Jr., Assistant to the Secretary for Congressional Affairs, Department of Commerce, that your appearance is postponed until Friday, September 12, 1975, at 10:00 a.m., in Room 2123 Rayburn House Office Building. At that time, your personal appearance will be required in response to the subpoena.

As previously indicated in my letter of September 2, 1975, this Subcommittee's investigation of possibly discriminatory and unlawful boycotts in commerce is being made pursuant to the Rules of the House of Representatives, in particular Rules X and XI.

Rule X(b) provides—

"(1) Each standing committee (other than the Committee on Appropriations and the Committee on the Budget) shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee, and the organization and operation of the Federal agencies and entities having responsibility in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated. In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee (whether or not any bill or resolution has been introduced with respect thereto), and shall on a continuing basis undertake future research and forecasting on matters within the jurisdiction of that committee."

You will note that as the legislative oversight arm of the House Committee on Interstate and Foreign Commerce, this Subcommittee's jurisdiction, in addition to "interstate and foreign commerce generally," includes oversight responsibility for the Federal Trade Commission and the Securities and Exchange Commission and the statutes which those agencies administer. Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce . . ." The provisions of the Securities Exchange Act of 1934 are also applicable. The Subcommittee has requested the "boycott reports" for the purpose of performing its legislative oversight responsibilities in accordance with the Rules of the House.

The Subcommittee looks forward to your presence on September 12.

Sincerely,

JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations.

* * *

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., September 12, 1975.

Hon. ROGERS C. B. MORTON,
Secretary, Department of Commerce,
Washington, D.C.

DEAR MR. SECRETARY: The Subcommittee is currently investigating boycotts and similar impediments on domestic commerce imposed by foreign governments, corporations, or citizens. As a part of this inquiry, the Subcommittee has sought copies of all reports filed since 1970 with the Department of Commerce in the Office of Export Control in accordance with the Export Control Regulations (15 CFR Sec. 369). This investigation is being conducted pursuant to our oversight responsibilities under the authority of Rules X and XI of the Rules of the House of Representatives giving the Subcommittee the duty to investigate the administration of laws within the jurisdiction of the Interstate and Foreign Commerce Committee and is particularly relevant to various bills pending before Congress.

In this regard, I would appreciate a list of all instances in which the Commerce Department has circulated tender offers by foreign governments or firms containing boycott provisions; principally clauses prohibiting a domestic offeree from doing business with Israel, or any Israeli citizen, or any persons of Jewish faith and/or any domestic firm which declines to participate in the same or similar boycott, or with any firm that fails to answer questionnaires respecting the nature of their relationship with Israel during the last two years. The Subcommittee would also appreciate copies of the tender offers containing such clauses as well as the Commerce Department cover letters which may have been attached to them.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

APPENDIX I

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To: Mark L. Rosenberg and/or Bradley D. Stam and/or Albert J. McGrath.

You are hereby commanded to summon Honorable Rogers C. B. Morton, Secretary, U.S. Department of Commerce, Washington, D.C 20230, to be and appear before the Subcommittee on Oversight and Investigations (under the authority of Rules X and XI of the Rules of the House of Representatives, 94th Congress) of the Interstate and Foreign Commerce Committee of the House of Representatives of the United States, of which the Hon. John E. Moss is chairman, and to bring with him the documents described in the Attachment to this subpoena (personal appearance is not required if the described documents are made available in the Subcommittee offices on or before August 5, 1975) in their chamber in the city of Washington, on Thursday, September 4, 1975, in Room 2323, Rayburn House Office Building, at the hour of 10:00 a.m. then and there to testify touching matters of inquiry committed to said Committee; and he is not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives of the United States, at the city of Washington, this 28th day of July, 1975.

Attest:

HARLEY O. STAGGERS, *Chairman.*
W. PAT JENNINGS, *Clerk.*

ATTACHMENT TO SUBPOENA 94-1-56

This subpoena refers to documents filed with the U.S. Department of Commerce between December 31, 1969 and the date of this subpoena.

Documents To Be Provided

All reports filed with the U.S. Office of Export Administration pursuant to Section 369.2 Export Administration Regulations of June 1, 1974, and predecessors and successors to that regulation.

APPENDIX J

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., September 5, 1975.

MEMORANDUM

To: Hon. John E. Moss, Chairman.
From: Michael R. Lemov, Chief Counsel, and
Michael F. Barrett, Jr., Senior Counsel.
Subject: Rogers Morton subpoena/Arab boycott.

The Subcommittee has subpoenaed Secretary Morton for the Department of Commerce's "exporter's reports" dealing with the Arab boycott. Mr. Morton has indicated he will not comply with the subpoena but that he would be willing to furnish the Subcommittee with copies of the reports from which significant information will have been deleted.

As a result of my legal research, I have concluded there is no legal basis for withholding from Congress the reports or any part thereof.

(1) The statute[1] asserted by Secretary Morton for treating such reports as confidential does not authorize withholding from Congress. In those instances in which Congress has agreed to limit its own access, it has done so specifically and in detail (e.g., Internal Revenue Code and Investment Advisers Act of 1940). The

[1] 50 USC App. 2406(c) quoted in full, *infra*, at p. 10.

failure to state any limitation on Congressional access clearly means access was intended for legislative purposes under Article I of the Constitution and House Rules.

(2) The statute does not provide an absolute right of confidentiality since the Secretary has authority to publish or disclose such reports. No exporter filing reports can claim he was misled into relying upon absolute confidentiality.

(3) Carried to its logical conclusion, the Secretary's argument would bar Congress from obtaining information in literally dozens of cases where statutes authorize agencies not to publicly disclose but are silent as to Congress.

(4) The Subcommittee investigation has a valid legislative purpose. Oversight of the Federal Trade Commission and the Securities and Exchange Commission; adequacy of the Federal Trade Commission Act, the Webb-Pomerene Act, and the Federal securities laws.

(5) The subpoena was duly authorized by Subcommittee during its meeting on July 28, 1975, after discussion, and was lawfully served upon the Secretary.

BACKGROUND

In October 1945, the Arab League agreed to recognize formally a *de facto* boycott then existing against Jewish goods produced in Palestine. In June 1946, the Arab League passed a resolution which extended the boycott to all Arab states, under which no Arab was to purchase an article produced by a Palestine Jew. The boycott was later expanded to include other business transactions such as land transfers. In February 1948, the Arab League members considered extending the boycott to any country or foreign business firm that aided the Zionist cause, but deferred formal action on this all inclusive boycott until April 1950. In the meantime, Israel declared its independence on May 15, 1948. In March 1951, the Arab League established a boycott office to coordinate action against Israel and to review the status of companies and organizations on the boycott list.

With the effectiveness of the Arab oil embargo, new impetus was given to Arab insistence upon the boycott. As a result, demands for Congressional investigation became numerous, particularly with the beginning of the instant Congress. In April of this year, Chairman Moss initiated inquiries to the Department of Commerce and others about the boycott.

It became apparent that to investigate the effect of the embargo upon domestic commerce, it would be necessary to obtain reports of the boycott filed by American businesses with the Commerce Department. On July 10, 1975, Chairman Moss wrote the Director of the Office of Export Administration in the Department of Commerce asking for copies of all such reports filed since 1970. On July 24, 1975, Secretary Morton responded to the July 10 letter. He declined to make the materials available, citing section 7(c) of the Export Administration Act of 1969 and the possible injury to those who had filed reports in reliance upon Commerce Department's assurance of confidentiality; furnishing the reports to Congress, he implied, might constitute to a disclosure or publication in violation of the Act.

On July 28, 1975, after discussion of the investigation and the application of section 7(c) the Subcommittee authorized the issuance of a subpoena calling for the boycott reports. An August 22, 1975, Secretary Morton wrote Chairman Staggers, with copies of his letter to Chairman Moss and Speaker Albert. Mr. Morton again stated his refusal to surrender the materials and repeated his earlier arguments. He also indicated he would appear at a Subcommittee meeting to respond to the subpoena but that he would refuse to surrender any documents unless certain portions were deleted. The deletions he suggests are the names and other identifying characteristics of those filing reports. In my opinion the deletion would render nugatory any investigative benefit that might be obtained from the reports.

BOYCOTTING PRACTICES

The American Jewish Congress, based on information it has obtained, has outlined the various forms the Arab boycott may take:

1. Arab governments, companies and nationals agree not to do business in Israel or with the government, companies or national of Israel.

2. An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from doing business in Israel or with the government, companies or nationals of Israel.

3. An American company, as a condition of doing business with an Arab govern-

ment, company or national, agrees to refrain from doing business with any American company engaged in trade in or with Israel, its companies or nationals. (This could be described as a "secondary boycott.")

4. An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from doing business with any company whose ownership or management is predominantly Jewish and to remove (or refrain from selecting) corporate directors who are Jewish.

5. An American seller to Arab governments, companies or nationals agrees, as a condition of the sale, to ship its products only on carriers which are not on the Arab boycott list and banks agree to honor letters of credit requiring evidence that these restrictions have been met.

6. An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from hiring or promoting Jewish employees or agrees to dismiss Jewish employees.

The boycott set forth in item 1 above is not a matter which directly affects U.S. commerce and is not subject to American law. The situation described in item 6 above violates the Civil Rights Act of 1964 and various state and municipal laws against discrimination in employment. Since the Commerce Committee's jurisdiction in this area is only secondary, it is not covered in the memorandum.

LEGISLATIVE OVERSIGHT JURISDICTION

Rule X of the Rules of the House of Representatives assigns to the Committee on Interstate and Foreign Commerce responsibility for "interstate and foreign commerce generally" which includes the administration by the Federal Trade Commission of the FTC Act and other laws and also the Securities and Exchange Commission and its administration of the Federal securities laws. The same rule also provides:

"Each standing committee * * * shall review and study, on a continuing basis, the application, administration, execution, and effectiveness of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee, and the organization and operation of the Federal agencies and entities having responsibilities in or for the administration and execution thereof, in order to determine whether such laws and the programs thereunder are being implemented and carried out in accordance with the intent of the Congress and whether such programs should be continued, curtailed, or eliminated. In addition, each such committee shall review and study any conditions or circumstances which may indicate the necessity or desirability of enacting new or additional legislation within the jurisdiction of that committee * * *."

A. Federal Trade Commission

The various boycotting practices described earlier in this memorandum clearly fall within the legislative responsibility of the House Commerce Committee and its legislative oversight subcommittee. The U.S. Supreme Court has held that a boycott constitutes an unfair method of competition against which the Federal Trade Commission may proceed through the issuance of an order to cease and desist. *Fashion Guild* v. *FTC*, 312 U.S. 457 (1941). Any unfair method of competition which violates the antitrust laws also constitutes a violation of section 5 of the Federal Trade Commission Act. *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

Section 5 declaires unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce * * *." The boycott by United States companies or other companies in response to Arab demands would thus clearly constitute a violation of Section 5. To date, the FTC has not announced the institution of any formal proceeding involving a secondary boycott despite strong indications that such boycotts exist. Neither has the Commission asked the Department of Commerce for access to the reports of boycotts from which the Commission could launch an investigation if it so desired.

The Webb-Pomerene Act, which the Federal Trade Commission also administers, may be applicable to the boycott issue. The Act exempts export trade associations, within certain closely circumscribed bounds, from the provisions of the antitrust laws. A determination whether an association or group of American companies in association have exceeded the limitations of the Act [2] requires care-

[2] E.g. participating in secondary boycotts, fixing prices for domestic sale.

ful scrutiny by the Commission. Again, the reports filed with the Department of Commerce could be an essential starting point for a Commission investigation.

B. Securities and Exchange Commission

The Securities and Exchange Commission, which is also under the jurisdiction of the House Commerce Committee, has substantial responsibilities under the Federal securities laws which may be affected by the boycott. For example, the investment banking house of Lazard Freres was excluded by Credit Lyonnais, a nationalized French bank, from the underwriting of two major bond issues for state-owned corporations. While these particular incidents occurred in France, in the United States pressure was put on Merrill Lynch to exclude boycotted Jewish banks from acting as co-managers of two bond issues. When Merrill Lynch refused to exclude the boycotted banks, the Kuwait International Investment Company, which had been the source of the pressure, withdrew in both instances and the bond offerings were completed. While this represents successful resistence to Arab pressure, instances of no resistance are possible.

American investors who, because their trading accounts are with a blacklisted broker-dealer, are unable to invest in an initial offering of securities could be denied significant investment opportunities. The exclusion of any investing group must have restrictive effect upon an offering and thus ultimately upon the securities markets generally. Specifically, the practice could constitute a "manipulative or deceptive device or contrivance" and thus violate section 10(b) of the Securities Exchange Act of 1934.

Presently, the SEC has instituted no enforcement action as a result of the boycott. It has written Chairman Moss, "At present, the boycott does not appear to be a factor in any syndicates offering securities that fall wihin our jurisdiction." Nevertheless, it has not contacted the Department of Commerce for copies of reports on boycotting activity.

In the Fall of 1974, the SEC conducted hearings into whether or not true beneficial ownership of securities should be disclosed. Currently, it is possible to withhold the identity of the true owner of a security. As a result, the agency has proposed to amend its rules and regulations to require disclosure of beneficial ownership. Such amended proposals would be useful in monitoring foreign investment efforts to acquire control of American corporations. These proposed amendments are tied to the increasing impact of Arab investment efforts and, thus, to the boycott.

In accordance with the Securities Exchange Act of 1934, shareholders have the right, with certain defined limitations, to have proposals regarding management and the conduct of a corporation's operations included in the company's proxy soliciting materials. To date, the SEC is not aware of any stockholder proposal regarding the Arab boycott which has been withheld from proxy materials but the SEC cannot be certain whether any such proposals have been made. Conceivably, such proposals could be made in the future. The nature and extent of any boycotting actions would be relevant for the Commerce Committee's consideration whether the laws and regulations covering proxy materials and their administration are adequate.

DEPARTMENT OF COMMERCE'S POSITION

Secretary Morton has stated in his letter of August 22, his basis for refusing to make the subpoenaed materials available:

"Firms reporting pursuant to Section 369.2 of the Export Administration Regulations were expressly advised that the information contained in their reports was deemed confidential and would not be disclosed. These reports contain details of specific transactions. The reporting firms could be injured if their competitors gained access to such commercial proprietary information. Moreover, disclosure of the identity of such firms might expose them to economic pressures and counter boycotts by certain domestic consumer groups. In short, in the absence of an overriding national interest to be served by the disclosure of these documents, such disclosure is clearly not justified under the terms of Section 7(c) of the Export Administration Act. There is undoubtedly a national interest in disclosing to the Congress and the public, the number of reports received, the types of restrictive trade practices involved and the actions which the reporting firms have indicated they intended to take in response thereto. Such summaries are regularly published in our Quarterly Reports to the Congress and are made

available to the public. However, I cannot perceive any national interest to be served by disclosing the identity of the reporting firms and the commercial proprietary information contained in their reports. I should reiterate that I do not base my position on any claim of executive privilege, but rather on the exercise of the statutory discretion conferred upon me by the Congress."

Thus, the Secretary is arguing that furnishing the materials to Congress is "publishing or disclosing" within the prohibitions of section 7(c) of the Export Administration Act of 1969. Section 7(c) [50 USC App. 2406(c)] provides:

"No department, agency, or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest."

The predecessor of this section was first enacted into law in section 6(c) of the Export Control Act of 1949 and the wording of the section has not changed with subsequent reenactments. The 1949 House Report, in referring to this section, merely repeats the language of the statute. The Senate Report is silent on the provision. Subsequent reenactments have not discussed the section under consideration. The legislative history, therefore, offers no support for the Secretary's position but does not dispose of the issue of whether furnishing the materials to Congress is "publishing or disclosing."

The Securities and Exchange Commission, in addition to supplying this Subcommittee in the past with confidential information, has also made materials available to other Congressional committees and subcommittees. Senator Church, for example, asked for certain materials which a number of large oil companies had filed with the Commission pursuant to the confidential treatment provisions of the Securities Exchange Act of 1934. Some of the companies volunteered in advance that the material could be made available to Congress; some did not. The Commission advised those who had not volunteered that it intended to make the materials available to the Senator and his Committee regardless of their concurrence. All companies then agreed to the Commission making the material available.

We have had instances of the Federal Trade Commission providing materials to the Subcommittee which were not public and which were covered by Section 10 of the Federal Trade Commission Act, described in the next section of this memorandum. Those have included the investigation of the American Gas Association and the major natural gas producers, the ITT-Continental investigation, and the beer investigation.

APPLICABLE LAW

Section 7(c) is not an absolute prohibition against disclosure of the boycott reports. The Secretary of Commerce is specifically authorized to determine that withholding of the reports is contrary to the national interest and thus he may make any or all such reports public as he, in his discretion, determines. The form on which boycott requests must be reported to the Department specifically provides: "information furnished herewith is deemed confidential and will not be published or disclosed *except as specified in Section 7(c) of the Export Administration Act of 1969.*" (Emphasis added) Thus, no one filing such a report can reasonably claim that he relied upon an assurance of absolute confidentiality when he filed his report.

The limited granting of confidentiality to these reports is similar to the granting of confidential treatment by various other governmental agencies and Departments. For example, the Federal Trade Commission Act has a provision whereby "any officer or employee of the Commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor . . . ." (Section 10). The Commission has interpreted this section to apply to trade secrets and other proprietary information.

Similarly, Section 24 of the Securities Exchange Act of 1934 provides for the granting of confidential treatment of "trade secrets of processes. Traditionally, the Federal Trade Commission and the Securities and Exchange Commission have made materials available to the House Commerce Committee on request which might otherwise have been given confidential treatment.

There are instances in which the Congress had limited its access to materials filed with an executive department or agency. The Internal Revenue Code, for example, limits Congressional access to income tax returns to the House Committee on Ways and Means, the Senate Finance Committee, the Joint Committee on Internal Revenue Taxation or a select committee of either House "specifically authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution." (26 USC 6103).

Each of the six statutes administered by the Securities and Exchange Commission authorizes confidential treatment in one form or another. In only one instance, however, is there any limitation on the right of Congress to access to Commission information. Section 210 of the Investment Advisers Act of 1940 prohibits disclosure without Commission approval, of certain information but further declares: "the provisions of this subsection shall not apply . . . in the case of a resolution or request from either House of Congress." In this single instance, the right of a Congressional committee with legislative oversight jurisdiction over the Commission might be limited to that specific regard.

Since Congress has specifically provided for limitations on its right to information, the absence of a stated limitation can only be interpreted as meaning that Congress has not limited itself and is therefore entitled to access to information. This interpretation is a well-established principle of statutory construction.

CONGRESSIONAL RIGHT TO KNOW

The right of Congress to investigate cannot be questioned. The Supreme Court, in May of this year, again recognized the well-established principle that Congressional subpoenas are a legitimate use by Congress of its power to investigate. Thus, in *Eastland* v. *United States Servicemen's Fund* (No. 73-1923, May 27, 1975), the Court stated:

> The power to investigate and to do so through compulsory process plainly falls within that definition. This Court has often noted that the power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."

The Court went on to note that the Congressional right to investigate without limitation is intended to "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary." Accordingly, the Secretary of Commerce may not oppose the Subcommittee's subpoena by court action. See also, *Oklahoma Press* v. *Walling*, 327 U.S. 186 (1946); *McGrain* v. *Daugherty*, 273 U.S. 135 (1927).

The Secretary has suggested that he would surrender certain information contained in the "boycott reports" provided he could delete material which might identify the person or entity submitting the reports. This would not satisfy the investigative needs of the Subcommittee. The reports were requested for the purpose of identifying those who have been approached to participate in the boycott. These will provide fundamental leads from which the staff could begin interviews and conduct a full investigation.

In addition to providing leads, the full reports are needed so that the Subcommittee may determine the areas of commerce affected by the boycott and the extent of the boycott. We are also interested in examining copies of any compliance documents required by the Arabs to determine whether secondary boycotts are being required as a condition to doing business. Furthermore, a substantial percentage of those filing reports have not indicated whether or not they are complying with the boycott. This is a question which the Department, in its form, permits the one filing the report to leave unanswered. Because of the materiality to the Subcommittee's investigation of the compliance or non-compliance with the boycott request, the Subcommittee may desire to have more complete information. This cannot be done without full access to the reports. Consequently, complete access to the reports is necessary and in furtherance of a legitimate Subcommittee investigation.

APPENDIX K

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., September 19, 1975.

To: Hon. John Moss, Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce.
From: American Law Division.
Subject: Analysis of Attorney General opinion advising Secretary of Commerce that he need not comply with a congressional committee subpoena.

This is in response to your request that we analyze and comment upon an opinion of the Attorney General of the United States, issued September 4, 1975, which advised the Secretary of Commerce that he need not comply with a subpoena of the House Interstate and Foreign Commerce Committee directing him to produce certain reports filed with the Department pursuant to section 4(b) of the Export Administration Act of 1969, 83 Stat. 841, as amended, 50 U.S.C. App. 2403(b), on the ground that the confidentiality requirement of section 7(c) of that Act extends to the Congress and its committees as well as the general public. The section in question provides:

"(c) No department, agency, or official exercising any functions under this Act [sections 2401 to 2413 of this Appendix] shall publish or disclose information obtained hereunder which is deemed confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the head of such department or agency determines that the withholding thereof is contrary to the national interest."

The Attorney General's conclusion is not based upon any constitutionally based privilege. Rather, it is founded upon the following line of reasoning: Restrictions against agency disclosure of information "are presumptively binding even with respect to requests or demands of congressional committees." That this assumption accords with "general legislative intent" is demonstrated by (1) the existence of confidentiality statutes which explicitly except congressional requests for information; (2) the legislative history of the subject Act; (3) the "apparently consistent administrative construction" of the provision that Congress was not entitled to information gathered under the Act; and (4) congressional reenactment of the provision with knowledge of the aforementioned administrative construction.

Close analysis of the opinion reveals, however, that no basis exists for the Attorney General's basic presumption in the circumstances of this case. Further, the legislative history of the Act does not support the so-called "standard interpretation" but rather appears to point to an opposite conclusion. And, finally, the administrative construction of the provision has been neither consistent nor accepted by the Congress.

Under the circumstances of the instant situation, if one accepts the validity of the assumption that a confidentiality statute which does not explicitly except the Congress from its reach thereby precludes it from seeking information covered by that statute, one must also accept the proposition that Congress may be divested of its constitutional prerogatives by implication. Such a proposition appears contrary to widely accepted canons of constitutional construction, past congressional practice, and sound reason.[1a]

There can be no doubt that a broad oversight capability is a constitutional prerogative of the Congress. Although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony for the purpose of performing its legislative functions, the practice of the British Parliament and several decisions of the Supreme Court of the United States have firmly established that the invesigatory power of Congress is so essential to the legislative function as to be implied from the general vesting of legislative power in Congress. *McGrain v. Daugherty*, 273 U.S. 135 (1927); *Watkins v. United States*, 354 U.S. 178 (1957); *Barenblatt v. United States*, 360

[1a] See, e.g., *In re Chapman*, 166 U.S. 661, 671–72 (1897); *Jurney v. MacCracken*, 294 U.S. 125 (1935); *Seymour v. U.S.*, 77 F.2d 577, 579 (8th Cir. 1935).

U.S. 109 (1959); *Eastland v. United States Servicemen's Fund*, —U.S.— (No. 73-1923, May 27, 1975). Chief Justice Warren speaking for the Court in *Watkins* described the power as follows:

"We start with several basic premises on which there is general agreement. The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is the power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. . . . Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself, it must be related to, and in furtherance of, a legitimate task of the Congress." 354 U.S. at 187.

Legitimate legislative tasks have been defined as activities that are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Gravel v. United States*, 408 U.S. 606, 625 (1972). See also, *Doe v. McMillan*, 412 U.S. 306, 313 (1972).

More recently the Court has reiterated its view that the power of effective congressional inquiry is an integral part of the legislative process:

"The power to investigate and to do so through compulsory process plainly falls with [the *Gravel* definition of legitimate legislative tasks]. This Court has often noted that the power to investigate is inherent in the power to make laws because '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.' *McGrain v. Daugherty*, 273 U.S. 125, 175 (1927) . . . Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate . . ."

> "'[W]here the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete, as some means of compulsion are essential to obtain what is needed.' *McGrain v. Daugherty*, supra, 273 U.S. at 175.

"It has also been held that the subpoena power may be exercised by a committee acting, as here, on behalf of one House . . . Without such power the Subcommittee may not be able to do the task assigned to it by Congress." (*Eastland v. U.S. Servicemen's Fund*, supra, slip opinion at pp 12–13.)

Thus, it would appear clear that the Subcommittee's broad oversight mandate entitles it to exercise plenary investigative and information gathering authority; and since that authority is constitutionally based it may be limited or waived only by some other *explicit* statutory restricion or consitutional privilege.

Careful examination of section 7(c) reveals that neither its express language nor any necessary implication from that language restricts access by duly authorized committees of Congress to information held by the Department of Commerce. Indeed, it would be highly unusual for Congress to limit or divest itself of its constitutional and statutorily mandated oversight functions[1] by indirection. To the contrary, in the past Congress has shown that it is fully capable of limiting its access to information from the Executive to certain committees or, in rare instances, to the Congress as a whole, in a clear and explicit manner.

For example, § 1 of Pub. L. 92-403, 1 U.S.C. 112b, limits congressional access to international agreements, other than treaties, where in the opinion of the President, public disclosure would be prejudicial to the national security of the United States. In that event such agreements "shall not be so transmitted to the Congress but shall be transmitted to the committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives

[1] See 2 U.S.C. 190d (Supl. III, 1973).

under an appropriate injunction of secrecy to be removed only upon due notice from the President."

Similarly, the Internal Revenue Code limits inspection of tax returns to the Senate Finance Committee, House Ways and Means Committee, and the Joint Committee on Internal Revenue Taxtion or any select committee "specifically authorized to investigate returns by a resolution of the Senate or House." 26 U.S.C. 6103(d), 6104(a)(2). Also, the Atomic Energy Act contains an express provision respecting access to "restricted data" and creates a Joint Committee on Atomic Energy which exclusively receives information from the various agencies with respect to the activities and responsibilities of such agencies in the field of atomc energy. See 42 U.S.C. 2161–2166, 2251–2257, 2277.

Finally, several provisions of the United States Code expressly limit certain types of information available to Congress generally. For example, under 50 U.S.C. 402 g, j(b), the Congress' ability to obtain information about the Central Intelligence Agency, particularly with regard to expenditures, is severely limited.

The alleged presumption, even if valid, is rebutted by reference to another provision of the Export Administration Act. Under section 8 of the Act, 50 U.S.C. App. 2407, the provisions of the Freedom of Information Act (FOIA), 5 U.S.C. 552, are made specifically applicable to the functions of the Act:

"The functions exercised under this Act are excluded from the operations of sections 551, 553–559, and 701–706 of title 5, United States Code".[2]

The FOIA requires executive agencies to make available to the public all of their identifiable records except those involving matters which are within nine specifically stated exemptions in 5 U.S.C. 552(b), two of which (numbers 3 and 4)[3] may be applicable to the information covered by § 7(c). Indeed, the Supreme Court's recent decision in *Administrator, Federal Aviation Administration* v. *Robertson*, 43 U.S. L.W. 4833 (1975), makes it clear that section 7(c) is the type of provision that falls within exemption 3 as a matter that is "specifically exempted from disclosure by statute." Further, during the course of its opinion the Court noted that there are nearly 100 statutes or parts of statutes which restrict public access to specific government records. See, House Committee on Government Operations, Federal Statutes on the Availability of Information, 86th Congress, 2d Sess. (1960). Each of these statutes were declared covered by exemption 3.

But the FOIA makes all the exemptions *inapplicable* to Congress. Section 552(c) states: "This section is not authority to withhold information from Congress."

The import of this is plain. It is highly unlikely that Congress, with one hand, would have made applicable to the functions under the Act a disclosure statute which expressly reserved its right to obtain information from the Executive Branch, and with the other hand divest itself of such right by implication. Such a conclusion is demonstrably incongruous since that would mean the same result (by implication) would obtain with regard to nearly 100 other similar statutes. The effect of such construction, then, would be to allow different parts of the Export Administration Act to conflict and negate one another. It would also effectively turn the FOIA on its head and vitiate a substantial portion of Congress' oversight jurisdiction. None of these consequences appears clearly intended by Congress.

The Attorney General's reliance on the legislative history of the Act would also appear ill-founded. He correctly points out there was no consideration of section 7(c)'s application to Congress during the passage of the 1969 Act. However, this particular provision can be traced back to section 6(c) of the Export Control Act of 1949, 63 Stat. 7, where it appears in identical form. Senate Report No. 31, 81st Cong., 1st Sess. (1949) states:

"Section 6 of the bill furnishes the usual administrative powers of investigation, subpena, and the authority to require testimony under oath. . . . They are required for the prevention and discovery of such abuses . . . Ample safeguards

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[2] Section 8 is in virtually the same language as it appeared in the Export Control Act of 1949, Pub. L. 11, 81st Cong., 1st Sess., and has the exact same effect.

[3] 5 U.S.C. 552(b)(3) exempts matters that are "specifically exempted from disclosure by statute." 552(b)(4) exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Both exemptions may be arguably invoked against any public request for information.

against administrative misuse of these enforcement powers are provided by the requirement that they be utilized solely 'to the extent necessary or appropriate to the enforcement of this act * * *;' . . . and by the prohibition against disclosure of confidential information furnished. These safeguards will in the long run impart added effectiveness to invesigations of violations . . . which are contemplated by section 6 of the bill."

Thus it appears that the original congressional intent for this provision was as a safeguard against administrative abuse and not as a shield against congressional oversight activities.

In the fact of this original intent, three instances, one in 1956 and two in 1962, involve amendments introduced in committee and on the floor which would have inserted language in section 6(c) recognizing the right of Congress to obtain information under the Act. All were withdrawn and none went to a definitive vote. One was withdrawn, in the words of the Attorney General's opinion, "after the General Counsel of the Department of Commerce had stated that nothing in the present statute would prohibit the Department from furnishing information obtained under it to a congressional committee."

The three instances are cited as evidence to support the proposition that "in construing a statute, the interpretation adopted by the agency must be given weight" and that "[t]his principle is particularly applicable where a statutory provision which has been given an administrative interpretation is re-enacted by Congress without significant change."

Several courts have commented on the value for statutory interpretation of a legislature's failure to enact amendments to statutes.

"Logically, several equally tenable inferences could be drawn from the failure of Congress to adopt an amendment in the light of interpretation placed upon the existing law by some of its members, including the inference that the existing legislation already incorporated the offered change." *U.S.* v. *Wise*, 370 U.S. 405 (1962).

"If the failure of enactment of every amendment offered for consideration of Congress were necessarily held to shed light on the legislation sought to be amended, the search for Congressional intention would be endless and fruitless." *United States* v. *Guerlain Inc.*, 155 F. Supp. 77 (D.C. 1957).

Even assuming a long standing administrative interpretation, one court has stated that it may be insufficient to imply legislative ratification even in the face of inaction:

"True, long-standing administrative interpretation of a statute, acquiesced in by all interested parties, may form the basis for an inference that the administrative interpretation is correct. However, courts are properly chary of equating mere inaction with approval, in the absence of a solid foundation for the inference of conscious ratification. *Duncan* v. *Railroad Retirement Board*, 375 F. 2d 915, 919 (4th Cir. 1967)."

See also, *T.I.M.E., Inc.* v. *United States*, 359 U.S. 464 (1959); *N.L.R.B.* v. *Radio and Television Broadcast Engineers Union, Local 1212, IBEW*, 364 U.S. 573 (1961).

Finally, the Supreme Court's discussion in *Zuber* v. *Allen*, 396 U.S. 168, 192–193 (1969) of the weight to be accorded an agency's own construction of its enabling legislation is particularly pertinent here:

"While this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, see *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in committee hearings. See *Power Reactor Co.* v. *Electricians, supra; United States* v. *American Trucking Assns.*, 310 U.S. 534, 539 (1940). In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purposes and policies underlying the legislation. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112–114 (1946).

"The Court may not, however, abdicate its ultimate responsibility to construe the language employed by Congress. Those props that serve to support a disputable administrative construction are absent here.

"It is true that a report from the Federal Trade Commission set forth the computations employed under the 1936 Boston order which apparently provided

for a nearby differential. But the stark figures, set forth in the appendix to the report without explication, can hardly be said to have given the administrative construction the notoriety that this Court found persuasive in *Udall* v. *Tallman*, 380 U.S., at 18. In *Udall* the Court was impressed by the fact that the Secretary's interpretation had been a matter of public record and discussion. *Id.*, at 17. Even despite active congressional involvement in reviewing certain administrative action in connection with particular leases, the Court noted that it would not attribute ratification to Congress. *Udall* v. *Tallman*, *supra*."

Nothing in the legislative history of section 7(c) evidences an acquiesence in the Department's interpretation of the provision; indeed, that interpretation has not been consistently followed. Moreover, such interpretation cannot be said to enhance "the general purposes and policies underlying the legislation." Among the policies sought to be affected by the Act is the opposition to restrictive trade practices and boycotts against friendly countries and to encourage and request domestic concerns to refrain from furthering such trade practices and boycotts. It may be argued that Congress' inability to effectively monitor the degree to which its policies are being carried out in thwarting the underlying policy of the legislation.

Although the Attorney General's opinion does not raise the issue, in the past agencies with confidentiality provisions similar to section 7(c) have often invoked 18 U.S.C. 1905, which generally proscribes the disclosure of confidential information by a federal officer or employee, as a bar to compliance with congressional requests for information. That statute provides:

1905. DISCLOSURE OF CONFIDENTIAL INFORMATION GENERALLY

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.
>
> June 25, 1948, c. 645, 62 Stat. 791.

However, this prohibition against disclosure may not be invoked against a request of a standing committee of Congress or one of its subcommittees since it is inapplicable where discolsure is "authorized by law." See, e.g., *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970); *Frankel* v. *S.E.C.*, 376 F. Supp. 675 (S.D.N.Y. 1971), rev'd on other grounds, 460 F. 2d 813 (2d Cir.), *cert. denied* 409 U.S. 889 (1972); *California* v. *Richardson*, 351 F. Supp. 733 (N.D. Calif. 1972); *M. A. Shapiro and Co.* v. *S.E.C.*, 339 F. Supp. 467 (D.D.C. 1972); *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); 41 Op. Atty. Gen. 166 (1953); 41 Op. Atty. Gen. 221 (1955); 31 Op. Atty. Gen. 541 (1919).

The above-cited 1955 Attorney General opinion is particularly pertinent in the present situation. That opinion was generated by a request for confidential information from the Senate Committee on Interstate and Foreign Commerce to the Federal Communication Commission. Under the Communications Act the Commission may keep certain specified information confidential, 47 U.S.C. 154j, 213(f), 412. The Commission questioned its authority to furnish the information in light of the provisions of 18 U.S.C. 1905.

The Attorney General held that the authorization required by 18 U.S.C. 1905 was "reasonably implied" under either § 134(a) or 136 of the Legislative Reorganization Act of 1946, 2 U.S.C. 190b, 190d. Under § 134(a) standing committees have the authority to conduct investigations into matters under their jurisdiction and to require the production of such records as they deem advisable. Section 136 imposes on standing committees the duty of exercising "continuous watchfulness" concerning the execution by executive agencies of laws relative to subjects within the jurisdiction of the committees for the purpose of assist-

ing "the Congress in appraising the administration of the laws and in developing such amendments or related information as it may deem necessary." The purpose of this section is to require that the appropriate committees find out and then inform the Congress whether the executive agencies are carrying out the laws entrusted to their execution in accordance with the intent of Congress. Senate Report 1409, 79th Cong., 2d Sess., page 6.[4] The Attorney General concluded as follows (41 O.A.G. at 228):

"These provisions do not expressly authorize disclosure of the type of information referred to in 18 U.S.C. 1905. However, it is sufficient that the authorization is reasonably implied rather than express. 41 Op. A.G. 166. The authority which the Committee has under section 134(a) to require the information in question constitutes in effect an authorization to this section. To the extent that the information is sought by the Committee in the exercise of its duty under section 136, authorization to furnish the requested information to assist in carrying out the purpose of the section is implicit in that cooperation between the Federal agencies and the congressional committees which the Congress intended."

It may be noted that the above-discussed Attorney General opinion is cited by Attorney General Levi for the general proposition "that statutory restrictions upon executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees." It would appear that the weight of the presumption is relatively weak; and that the force of the oversight statutes discussed in that opinion, as well as the FOIA, are sufficient to rebut the alleged presumption raised by section 7(c).

CONCLUSION

It would seem doubtful that a valid presumption exists that Congress, by implication, could divest itself of its ability to obtain information in pursuance of its oversight function. In any event, contrary to the Attorney General's opinion, we conclude that section 7(c) of the Export Administration Act of 1969 does not prohibit, either by express language or necessary implication, disclosure of matters covered to an appropriate committee of the Congress; that the express applicability of the Freedom of Information Act to the functions under the Act is in fact persuasive indication that the prohibition was not meant to be applicable to Congress but only to the general public so as to avoid administrative misuse of confidential information; that Congress would divest itself of its ability to obtain information from relevant executive agencies by implication is contrary to the pervasive scheme of the subject legislation and in derogation of the statutorily imposed duty of oversight of standing committees of the Congress; and that the prohibition against disclosure of confidential information in 18 U.S.C. 1905 cannot be raised as an objection to disclosure by executive officials since such disclosure is authorized by law.

MORTON ROSENBERG,
Legislative Attorney.

APPENDIX L

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 4, 1975.

The Honorable the SECRETARY OF COMMERCE,
Washington, D.C.

DEAR MR. SECRETARY: If you approve, I should like to have published, in accordance with 28 U.S.C. 521, my opinion to you concerning the subpoena of the Interstate and Foreign Commerce Committee of the House of Representatives which directs you to produce certain reports filed with the Department of Commerce pursuant to § 4(b) of the Export Administration Act of 1969, 83 Stat. 841, as amended.

Please let me know if you have any objections to the publication.

Sincerely,

EDWARD H. LEVI,
Attorney General.

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[4] The 1946 Act only applied to Senate Standing Committees. The 1970 amendments, however, made § 136 applicable House standing committees also. Pub. L. 92-136, § 1.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., September 4, 1975.

The Honorable the SECRETARY OF COMMERCE,
Washington, D.C.

DEAR MR. SECRETARY: This is in response to your letter of August 22, 1975, concerning the subpoena of the Interstate and Foreign Commerce Committee of the House of Representatives which directs you to produce certain reports filed with the Department of Commerce pursuant to § 4(b) of the Export Administration Act of 1969, 83 Stat. 841, as amended (hereinafter the "Act"), 50 U.S.C. App. 2403(b). You request my opinion with respect to the question whether the Committee's subpoena overrides the confidentiality requirement of § 7(c) of the Act, 50 U.S.C. App. 2406(c). I conclude that the subpoena does not have that effect, and that the Committee is not entitled to receive the reports in question unless, in exercising the discretion granted by § 7(c), you determine that withholding them would be "contrary to the national interest."

The pertinent facts may be stated briefly. Section 3(5) of the Act, 50 U.S.C. App. 2402(5), provides in part that:

"It is the policy of the United States (A) to oppose restrictive trade practices or boycotts . . . imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in . . . [exporting] to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering . . . [such] restrictive trade practices or boycotts . . . ."

Section 4(b) calls for issuance of rules and regulations to implement § 3(5) and states that the rules and regulations are to "require that all domestic concerns receiving requests for the furnishing of information or the signing of agreements . . . [of the type specified in § 3(5)(B)] must report that fact to the Secretary of Commerce . . . ."

The Act's confidentiality provision, § 7(c), 50 U.S.C. App. 2406(c), reads as follows:

"No department . . . or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential . . . unless the head of such department . . . determines that the withholding thereof is contrary to the national interest."

The regulation of the Department of Commerce implementing § 3(5) expressly states that the information contained in reports filed by exporters "is subject to the provisions of Section 7(c) of the . . . Act regarding confidentiality. . . ." 15 CFR § 369.2(b). Moreover, the basic reporting form (Form DIB-621) states that: "Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in Section 7(c) of the . . . [Act]."

On July 10, 1975, the Chairman of the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce, Congressman John E. Moss, wrote a Department of Commerce official to request copies of all quarterly reports filed by exporters, since 1970, concerning any "request for boycott compliance." On July 24, 1975, you sent Congressman Moss a summary of boycott information reported by exporters, but you declined, in view of § 7(c) and your inability to make the requisite national interest determination, to furnish copies of the reports themselves. The ensuing subpoena, dated July 28, 1975, directs you to appear before the Subcommittee on September 4, 1975, and to bring with you "all reports filed with the . . . [Department of Commerce between December 31, 1969 and July 28, 1975] pursuant to Section 369.2 Export Administration Regulations of June 1, 1974, and predecessors and successors to that regulation." By letter of August 22 to the Chairman of the Committee, you again explained your inability to provide the reports themselves and requested postponement of the date of your appearance.

I may note at the outset that, in order to respond to your request, there is no need to consider whether a constitutionally based privilege is applicable. In my opinion, the statute is determinative.

Somewhat similar issues have been considered by prior Attorneys General. See, e.g., 27 Ops. A.G. 150 (1909) (subpoena of Senate committee for confidential information held by the Commission of Corporations); 41 Ops. A.G. 221 (1955) (request of Senate committee for confidential information held by the Federal Communications Commission); 42 Ops. A.G. no. 46 (1974) (request of House committee for tax return information). The foregoing opinions have proceeded under the general assumption—which I share—that statutory restrictions upon

executive agency disclosure of information are presumptively binding even with respect to requests or demands of congressional committees.

That this assumption accords with general legislative intent is demonstrated by the inclusion, in a number of statutes concerning confidentiality of information, of explicit exceptions for congressional requests.[1] When, as in § 7(c), such an exception, is not provided, it is presumably not intended. In the present case, this standard interpretation finds additional support in the legislative history of the statute, in an apparently consistent administraive construction, and in Congress' re-enactment of the provision with knowledge of that construction.

The current § 7(c) was enacted as part of the Export Administration Act of 1969, 83 Stat. 841. Our examination of the legislative history of the 1969 Act has revealed little discussion of the confidentiality requirement[2] and no consideration of its application to Congress. Since, however, the present provision was derived without change from § 6(c) of the Export Control Act of 1949, 63 Stat. 7, it is appropriate to consider the history of that earlier Act and related subsequent legislation.

As is true with regard to the 1969 Act, the legislative history of the 1949 Act sheds no real light upon the present issue.[3] In 1956, however, when a bill to extend the 1949 Act was before the Senate, the Senate Committee on Banking and Currency considered, but did not adopt, an amendment which would have *required* the agencies to comply with any demand of a congressional committee for documents concerning administration of the 1949 Act.[4] The amendment was prompted by the refusal of the Department of Commerce and other agencies to provide a Senate subcommittee with material relating to trade with Communist nations.[5] In explaining the failure of the Senate Committee on Banking and Currency to adopt the amendment, its chairman stated that, because the amendment involved an important constitutional principle (the question of the power of the executive branch to withhold information from Congress), the committee decided that inclusion of such a provision in the Export Control Act at that time would be inappropriate.[6] There was no suggestion that such an amendment was unnecessary, i.e., that the existing confidentiality provision was inapplicable to congressional demands.

In 1962, during consideration of legislation to extend the 1949 Act, two pertinent amendments to the confidentiality provision were considered. Congressman Kitchin, the Chairman of the House Select Committee on Export Control, proposed that § 6(c) of the 1949 Act be amended by addition of a statement that: "Nothing in this subsection shall be deemed to prohibit the disclosure of any information . . . to either House of Congress or to any duly authorized committee thereof. . . ." Congressman Kitchin explained that: "The present Administrator of the Act probably interprets . . . [§ 6(c)] as precluding him from furnishing such information to the Congress."[7] He added that the amendment would clarify the authority of the Administrator and "permits—does not command—full disclosure of information obtained under the act to either House of Congress. . . ."[8] Subsequently after the General Counsel of the Department of Commerce and the Secretary of Commerce had stated that nothing in the present statute would prohibit the Department from furnishing information obtained under it to a congressional committee, Congressman Kitchin withdrew his amendment.[9] The Congressman noted that the matter of disclosure of confidential information is "within the discretion of the Secretary of Commerce."[10]

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[1] See, e.g., 49 U.S.C. 1504 (information obtained by the Civil Aeronautics Board); 7 U.S.C. 12-1 (Department of Agriculture information on boards of trade). Regarding the background of the latter statute, see *Freeman* v. *Seligson*, 405 F.2d 1326, 1340-46 (D.C. Cir., 1968).

See also the Freedom of Information Act, 5 U.S.C. 552(c).

[2] See, e.g., S. Rep. No. 91-336, 91st Cong., 1st Sess. (1969), pp. 17, 25.

[3] The Senate report referred to the prohibition against the disclosure of confidential information as one of several "safeguards against administrative misuse of . . . [the statute's] enforcement powers." S. Rep. No. 31, 81st Cong., 1st Sess. (1949), pp. 5-6.

One congressman referred to the need to protect confidential information provided to the Government. He objected to the bill's failure to set forth standards regarding what constitutes "the national interest." 95 Cong. Rec. 1379 (1949) (Congressman Wolcott).

[4] The amendment, offered by Senator McClellan, appears in Hearings on S. 3238 before a Subcommittee on the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. (1956), p. 7 (hereinafter "Sen. Hearings"). The Secretary of Commerce opposed the amendment. Sen. Hearings, pp. 12-14.

[5] See Sen. Hearings, pp. 142-44.

[6] 102 Cong. Rev. 10405 (1956) (Senator Fulbright).

[7] Hearings on H.R. 11309 and S.J. Res. 88 before Subcommittee No. 1 of the House Committee on Banking and Currency, 87th Cong., 2d Sess. (1962), p. 22.

[8] *Ibid.*

[9] 108 Cong. Rec. 11548 (1962).

[10] 108 Cong. Rec. 11549 (1962).

The other pertinent amendment considered in 1962 was offered by Senator Keating" and would have replaced the existing § 6(c) with the following:

"(c) No department . . . or official exercising any functions under this Act shall withhold or refuse to disclose information obtained hereunder, except trade secrets submitted on a confidential basis, unless the head of such department . . . determines that the disclosure of such information will be contrary to the national security. Nothing in this section shall be deemed to prohibit the disclosure of any information obtained hereunder to either House of Congress or to any duly authorized committee thereof, if a request is made for such information by either House of Congress or by a duly authorized committee thereof."

Senator Keating stated that his amendment "would reverse the presumption in the present law against disclosure of information relating to trade with the Communists" and that, in addition, it "would specifically require that all information obtained under this Act be made available to the Houses of Hougress. . . ." [12] He referred to recent disputes between congressional committees and the Department of Commerce regarding the availability of such information.[13] Later, questions were raised about the effect of the amendment upon the treatment of trade secrets; and, agreeing that such issues required further study, Senator Keating withdrew the amendment.[14]

It is well established law that, in construing a statute, the interpretation adopted by the administering agency must be given weight. See, e.g., *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). This principle is particularly applicable where a statutory provision which has been given an administrative interpretation is re-enacted by Congress without significant change. See, e.g., *Zemel* v. *Rusk*, 381 U.S. 1, 11–12 (1965). Here, this last concept takes on added force, because congressional acquiescence in the administrative interpretation need not be entirely presumed, but can be seen in a legislative record which contains discussion of of the interpretation and rejection of several proposals to change it.

I see no sound basis for distinguishing, for present purposes, between reports concerning boycotts or restrictive trade practices and other kinds of information obtained by the Department of Commerce under the Act. The terms of § 7(c) of the Act clearly encompass the reports which are the subject of the present subpoena.

For the reasons discussed above, it is my opinion that you are not obligated to provide the subpoenaed reports to the Subcommittee. Issuance of the subpoena does not compel you to determine that withholding the reports would be contrary to the national interest. Congress has placed responsibility for making such determinations not with its committees, but with the Secretary of Commerce.[15] Unless you decide, in the exercise of your discretion, that such a determination is warranted, the confidentiality requirement of § 7(c) controls.

Sincerely,

EDWARD H. LEVI,
Attorney General.

APPENDIX M

U.S. DEPARTMENT OF COMMERCE,
THE ASSISTANT SECRETARY FOR DOMESTIC
AND INTERNATIONAL BUSINESS,
Washington, D.C., September 3, 1975.

Memorandum for: Arthur T. Downey, James Gleason, Edward J. Henriksen, Charles W. Hostler, Donald E. Johnson, Samuel B. Sherwin, and Clancy Zens.

Subject: Department Policy on Dissemination of Trade and Investment Opportunities Containing Restrictive Trade Practices.

Section 3(5) of the Export Administration Act states that "It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered by

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[11] 108 Cong. Rec. 10702 (1962).
[12] 108 Cong. Rec. 10702 (1962).
[13] Subsequently, the Acting Secretary of Commerce sent the Chairman of the Senate Committee on Banking and Currency a letter opposing the Keating amendment and describing in detail recent actions of the Department regarding release of export information to congressional committees. See 108 Cong. Rec. 11479–81 (1962).
[14] 108 Cong. Rec. 11488 (1962).
[15] Cf. *Administrator, Federal Aviation Administration* v. *Robertson*, 43 U.S. Law Week 4833, 4837 (1975).

foreign countries against other countries friendly to the United States, and (B) to encourage and request U.S. concerns not to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting such restrictive trade practices or boycotts." Commerce Department regulations pursuant to Section 3(5) require that any U.S. concern receiving a request to participate in a restrictive trade practice must report the receipt of such request to the Office of Export Administration, Bureau of East-West Trade. While the language of Section 3(5) is addressed to restrictive trade practices or boycotts in general, in practice its application has been limited almost exclusively to restrictive trade practices incident to the Arab boycott of Israel, whereby Arab countries enforce a secondary boycott of dealing with foreign firms which undertake certain types of business relations with Israel.

Virtually every transaction with most Arab countries will involve a boycott of Israel request at some stage of the transaction. Such requests may take various forms—e.g., firms bidding on contracts or initially establishing business relations in an Arab country may be confronted with a questionnaire about their relations with Israel; bid invitations and/or specifications may contain a clause, e.g., that the goods may not be of Israeli origin or the product of a boycotted firm, or that the bidder agrees to abide by the country's boycott of Israel regulations; or the request may appear only at the letter-of-credit stage of a transaction as a requirement that the shipping documents include certification that the goods are not of Israeli origin and that the ship and/or insurance company is not boycotted by the Arab countries.

Boycott clauses of this type customarily do not appear in foreign service telegrams or airgrams reporting trade and investment opportunities from the Arab countries, although this may possibly occur for some opportunities requiring special handling. Follow-on bid documents and specifications, however, can be expected in most cases to include boycott clauses.

Important

It is of the utmost importance that the Department of Commerce *not* disseminate *any* opportunity or other document which contains a restriction or request which would constitute discrimination against U.S. citizens, concerns, or institutions on the basis of race, color, religion, national origin, or sex, as distinguished from restrictions or requests aimed at implementing the Arab countries' secondary boycott of Israel. For example, a request directed against persons of the Jewish faith or against Jewish-owned firms would clearly be a discriminatory action, not a boycott action. Note, however, the distinction between "national origin" and nationality." As noted, a reference to "persons of the Jewish faith" or "Jewish-owned firms" would be to national origin and therefore discriminatory. On the other hand, a reference to "Israeli," "Israeli origin," or "owned by Israeli nationals" is to nationality and is therefore a boycott rather than a discriminatory matter. It is improbable that documents reaching Commerce through the trade opportunity channels will contain references to discrimination, since our Embassies follow a policy of not transmitting such documents. All concerned units should exercise special care, however, to detect any such references that might appear in documents received from other sources. I repeat, the Department *will not*, under any circumstances, disseminate any document bearing a reference to discrimination on the basis of race, color, religion, national origin, or sex. Any document received by any unit containing such a discriminatory reference should be immediately forwarded to the office of the Assistant General Counsel for DIBA for referral to the Departments of Justice and State for appropriate action.

The procedures which are outlined below therefore apply only to business opportunities containing restrictions or requests aimed at enforcing the secondary boycott of Israel.

The Department recently was accused of violating the U.S. policy stated in the above Section 3(5) by disseminating trade opportunity specifications containing boycott clauses. Such dissemination was, in fact, the case. This charge focused attention to the fact that the Department currently was failing to implement a policy decision of 1965 requiring that a statement of the U.S. policy of opposition to the boycott be attached when disseminating any trade opportunity document containing a boycott clause.

The Department will continue to disseminate trade and investment opportunities from Arab countries, including those with boycott clauses. It is imperative, however, that we immediately reinstitute procedures to make this activity consistent with the provisions of Section 3(5). All offices concerned with handling trade and investment opportunities are hereby directed to implement the procedures outlined below effective September 8, 1975. Heads of operating units will be responsible for assuring that all personnel handling trade and investment opportunities are thoroughly familiar with these procedures. Interim measures have been put into effect to ensure against dissemination of any document containing a boycott clause before the effective date of the procedures.

1. All trade and investment opportunities and related documents (bid conditions, specifications, etc.) from Arab countries reaching Commerce through the foreign service, Arab embassies in Washington, or other sources will be screened for any reference to the Arab boycott of Israel. Although the initial trade opportunity reports (TOPS and other "special-handling" telegrams or airgrams) customarily will not contain such references, they are to be included in the screening process. The countries involved, and the respective reporting posts, appear in Attachment I.

2. All trade and investment opportunities and related documents disseminated directly to U.S. firms will be prominently *stamped* with a statement of U.S. policy regarding the boycott. Trade and investment opportunity telegrams (including TOPS programs), airgrams, or other bid documents related to such opportunities which containd no reference to the Arab boycott of Israel will be stamped to indicate that the recipient may be confronted with a boycott request at some later stage of a resulting transaction and to give the statement of U.S. policy. For trade or investment opportunity documents which contain a reference to the boycott of Israel, the stamp will direct the recipient's attention to the specific paragraph and page containing the boycott clause and also state the U.S. policy. No trade or investment opportunity, or related document, from an Arab country will be disseminated without the appropriate stamp. Facsimilies of the two stamps appear in Attachment II. The stamp must appear *prominently* and *boldly* on the document; it should appear on the first page of the document, unless such positioning would obscure significant printed information. If possible, make copies from the original stamped document; avoid re-copying which produces a dim imprint of the stamp.

3. Adherence to these procedures can best be assured if control is centralized rather than being dispersed among the operating units which disseminate opportunities to the business community. The most effective point for such control is the point of entry of the documents into Commerce. Accordingly, I assign to the Communications Branch, Communications Management Division, Office of of Administrative Support, Directorate of Administrative Management the responsibility for screening and appropriately stamping all incoming trade or investment opportunity documents from Arab countries prior to distribution to action units. A qualified analyst is to be assigned this responsibility in the Communications Branch. This responsibility should remain with the same analyst on a continuing basis to the fullest extent possible. In no case will such responsibility be assigned to an analyst who has not been adequately briefed on the requirements of these procedures.

4. Assignment of the primary screening and stamping responsibility to the Communications Branch does not relieve operating units which disseminate the opportunities of the responsibilities to recheck any such documents before they are sent out. If in such a recheck the operating unit finds a document covered by these procedures which is unstamped or inappropriately stamped, it will have the document appropriately stamped by the Communications Branch before any dissemination is made, and the Communications Branch will submit to Deputy Assistant Secretary Johnson a written explanation for the error. The Overseas Business Opportunities Division, Office of Export Development, Bureau of International Commerce, will be responsible for assuring that all TOPS opportunities from Arab countries have the appropriate stamp before they are put into the computer.

5. In the case of business opportunities published in *Commerce Today*, it is not deemed necessary to include the full U.S. policy statement with each opportunity published. As the alternative, a box item will be prominently displayed on each page of the publication which contains trade or investment opportuni-

ties from any Arab country listed in Attachment I. A similar procedure will be adopted by *Commerce Business Daily*. In this case, the box item will appear at the beginning of the page which carries overseas business opportunities. The content of the statement for the box item appears in Attachment III.

6. The Commerce Action Group for the Near East, Bureau of International Commerce, will be responsible for coordinating the initiation of these procedures. Questions concerning the procedures should be addressed to Jack Hearn of that office on extension 3993. An appropriate official will be designated at a later date to monitor the implementation of the procedures and ensure continuing compliance by all operating units.

I wish to emphasize again the importance of strict adherence to these procedures. Any failure in this respect could subject the Department to serious criticism and possibly to legal action.

TRAVIS E. REED,
Assistant Secretary for Domestic and International Business.

ATTACHMENT I

Countries from which trade and investment opportunities are subject to these procedures:

Country:	*Reporting Post(s)*
Algeria	Algiers. Oran.
Bahrain	Manama.
Egypt	Alexandria, Cairo.
Iraq	Baghdad.
Jordan	Amman.
Kuwait	Kuwait.
Lebanon	Beirut.
Libya	Tripoli.
Mauritania	Nouakchott.
Morocco	Casablanca, Rabat.
Oman, Sultanate of	Muscat.
Peoples Democratic Republic of Yemen (South Yemen)	
Qatar	Dohar.
Saudi Arabia	Dhahran, Jidda.
Somalia	Mogadiscio
Sudan	Khartoum.
Syria, Arab Republic of	Damascus.
Tunisia	Tunis.
United Arab Emirates	Abu Dhabi.
Yemen, Arab Republic of (North Yemen)	San'a.

NOTE.—Algeria, Morocco, and Tunisia apply the boycott with less severity than other Arab countries, and many documents may be received from these countries without boycott clauses. Nevertheless, screening of such documents should be thorough in order to catch the occasional boycott reference that may appear.

Mauritania, Somalia, and Sudan are more recent entrants to the League of Arab States, the parent organization of the Arab boycott. It is not known to what extent they may apply the boycott. Nevertheless, documents from these countries should be screened with equal care to that given to documents from the other Arab countries to avoid possible lapses in the procedures.

ATTACHMENT II

1. Stamp to be affixed on trade or investment opportunities, or related bid documents, which *do not contain* any reference to the Arab boycott of Israel.

Important

It is possible that at some stage of any transaction that may result from this opportunity, you will be asked to participate in a restrictive trade practice or boycott as defined in the Commerce Department's Export Administration Regulation (15 CFR, Part 368 et. seq.). You are reminded that, pursuant to Section 3(5) of the Export Administration Act of 1969, it is the policy of the United States (A) to oppose restrictive trade practices or boycotts postered or imposed by foreign

countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting such restrictive trade practices or boycotts. Accordingly, I encourage and request individuals and firms receiving such requests to refuse to comply with them.

You are further reminded that the receipt of any request to participate in a restrictive trade practice or boycott must be reported to the Department of Commerce, per Section 369.2 of the above-cited regulations.

SECRETARY OF COMMERCE.

2. Stamp to be affixed on trade or investment opportunities, or related bid documents, which *contain* a reference to the Arab boycott of Israel.

Important

Your attention is addressed to paragraph—of this document, which contains a request for participation in a restrictive trade practice. You are reminded that pursuant to Section 3(5) of the Export Administration Act of 1969, it is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting such restrictive trade practices or boycotts. Accordingly, I encourage and request you not to comply with the request.

You are further reminded that the receipt of any request to participate in a restrictive trade practice or boycott must be reported to the Department of Commerce in accordance with the *export administration regulations* (15 CFR, Part 369 et. seq.).

SECRETARY OF COMMERCE.

NOTE.—Following the paragraph number, indicate the page number if the document contains more than one page.

ATTACHMENT III

Statement to appear prominently in a box item on any page of *Commerce Today* which contains a trade or investment opportunity from an Arab country.

Important

Member countries of the League of Arab States employ a secondary boycott against foreign firms which undertake certain specified types of business relationships with the State of Israel. It is possible that U.S. firms responding to trade or investment opportunities from Arab countries published herein may be asked at some stage of a transaction to participate in an Arab boycott-related restrictive trade practice as defined in the Department's Export Administration Regulations (15 CFR, Part 369 et. seq.). Firms are reminded that pursuant to Section 3(5) of the Export Administration Act of 1969, as amended, it is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, and (B) to encourage and request U.S. concerns engaged in the export of articles, materials, supplies, or information to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting such restrictive trade practices or boycotts. Accordingly, U.S. concerns receiving such requests to participate in a restrictive trade practice or boycott are encouraged and requested to refuse to comply with them.

You are further reminded that U.S. concerns receiving requests to participate in a restrictive trade practice or boycott must report such receipt to the Department of Commerce in accordance with Section 369.2 of the above-cited regulations.

APPENDIX N

COMMERCE DEPARTMENT,
Washington, D.C., September 25, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: During my appearance before the Subcommittee on Oversight and Investigations on September 22, Congressman Scheuer noted the fact that, under the Department's reporting requirements in effect since 1965, an exporter is asked but not required to indicate in his reports to the Department what he intends to do about the boycott-related request which he has reported.

As you recall, Congressman Scheuer noted that it would be desirable for the Department to know which companies complied with the boycott-related request and which did not.

In my response to Congressman Scheuer, I indicated that I had been considering whether the answer to Item 10 of our reporting form should be made compulsory.

This is to advise you that I have given this matter further consideration and have concluded that, henceforth, information as to whether or not an exporter intends to comply with a boycott-related request should be sought on a mandatory basis. Accordingly, the Department's Export Administration Regulations and the reporting form are being so revised, effective for all reports submitted on or after October 1, 1975.

A copy of the Export Administration Bulletin announcing this revision and of the revised reporting form is enclosed for your information.

Sincerely,

ROGERS MORTON,
Secretary of Commerce.

Enclosures.

EXPORT ADMINISTRATION BULLETIN

Supplement to Export Administration Regulations Number 146 September 25, 1975

SUBJECT: REVISION OF REQUIREMENTS TO REPORT RESTRICTIVE TRADE PRACTICES OR BOYCOTT REQUESTS

It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. In accordance with this policy, all exporters are required to report such requests to the Office of Export Administration, and are encouraged to refuse to take any action that has the effect of furthering or supporting such restrictive trade practices or boycotts. In submitting these reports, exporters have not been required to indicate whether or not they would comply with the requests.

In order to provide more complete information with which to analyze the effects of boycott activity on U.S. trade, the Export Administration Regulations are being revised to require that in all reports submitted on or after October 1, 1975, exporters include a statement as to whether or not the exporter intends to comply with the requests. Form DIB-621P is being revised to reflect this new reporting requirement by making the response to Item 10 mandatory. Earlier versions of Form DIB-621P may still be used, provided the exporter completes Item 10. Letters submitted to report multiple requests must now indicate whether or not the requests will be complied with.

Accordingly, § 369.2 of the Export Administration Regulations (15 C.F.R. § 369.2) is amended as follows:

1. by adding to the end of subparagraph 369.2(b)(1) the following:

* * * All items on the form must be completed, including Item 10. If the exporter uses a version of the reporting form that indicates completion of Item 10 is optional, Item 10 must nevertheless be completed. If the exporter has not decided what his action will be, he must inform the Office of Export Administration within five business days of making a decision.

2. by revising subparagraph 369.2(b)(2)(viii) to read as follows:

(viii) The number of requests the exporter has complied with or intends to comply with. If the exporter is undecided, he is required to submit a further report within five (5) business days of making a decision on each such request.

Effective date of action: October 1, 1975.

RAUER H. MEYER, *Director,*
Office of Export Administration.

Old

FORM DIB-621
(REV. 4-76)
(FORMERLY IA-1014)

U.S. DEPARTMENT OF COMMERCE
DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION
BUREAU OF EAST-WEST TRADE
OFFICE OF EXPORT CONTROL
WASHINGTON, D.C. 20230

Form Approved;
Budget Bureau No. 41-R2305

U.S. EXPORTER'S REPORT
OF REQUEST RECEIVED FOR INFORMATION, CERTIFICATION, OR OTHER ACTION INDICATING A RESTRICTIVE TRADE PRACTICE OR BOYCOTT AGAINST A FOREIGN COUNTRY

A. IMPORTANT. It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take, but are not legally prohibited from taking, any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.

Accordingly, I encourage and request individuals and firms receiving such requests to refuse to comply with them.

Frederick B. Dent
Secretary of Commerce

B. INSTRUCTIONS: This form must be completed by a U.S. exporter whenever he is requested to take any action, including the furnishing of information or the signing of an agreement, which is designed to support a restrictive trade practice or boycott fostered or imposed by a foreign country against any other country not included in Country Group S, W, Y, or Z. (Country Groups are listed in Supplement No. 1 to Part 370 of the U.S. Department of Commerce Export Control Regulations.) Submission of this form is mandatory (50 USC App. 2403(b). Failure to comply subjects the U.S. exporter to the penalties prescribed in Section (6) of the Export Administration Act of 1969, as amended. It must be submitted to the U.S. Department of Commerce, Domestic and International Business Administration, Bureau of East-West Trade, Office of Export Control, Washington, D.C. 20230, within fifteen business days from the date of receipt of such a request. Whenever a person receives more than one request for action with reference to the same transaction, only the first request need be reported to the Office of Export Control (See Part 369 of the Export Control Regulations).

C. CONFIDENTIAL. Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in Section 7(c) of the Export Administration Act of 1969 (50 USC App. 2406(c)).

1. Name and Address of U.S. Exporter submitting this report:

Name:

Address:

City, State, and Zip Code:

2. Exporter's Reference No. *(If any)*:

3. Name of Country/ies against which the request is directed:

4. Date request was received by me/us:

5. I/We received this request from:

Name:

Address:

City and Country:

6. Specify type of request received. *(If any item in 6b is checked, complete item 7)*

a. ☐ Questionnaire *(Attach copy)*

b. ☐ Other type of request for information or action contained in:

☐ Trade Opportunity ☐ Certificate of Origin ☐ Consular Invoice
☐ Bid Specification ☐ Certificate of Manufacture ☐ Other *(Specify)* _____
☐ Purchase Order ☐ Letter of Credit

7. If item 6b above is checked, give the specific information or action requested. (Use direct quotations from the request.)

8. If the request relates to a specific transaction, describe the commodities or technical data involved. (The description of the commodity or technical data may conform to the description on the order or to usual commercial terminology, and may but need not be in terms of the Commodity Control List or Schedule B.)

Quantity	Description	Value

9. Additional Remarks:

10. Action: (Completion of the information on this form would be helpful to the U.S. Government but is not mandatory.)

a. ☐ I/We have not complied and will not comply with the request for information or action described above.

b. ☐ I/We have complied with, or will comply with, the request for information or action described above.

c. ☐ I/We have not decided whether I/we shall comply with the request for information or action described above and I/we will inform the Office of Export Control of my/our decision.

11. I certify that all statements and information contained in this report are true and correct to the best of my knowledge and belief.

Sign here in ink _____ Type or print _____ Date _____
(Signature of Person Completing Report) (Name and Title of Person whose Signature Appears on the Line to the Left)

USCOMM-DC 10489-P19

FORM DIB-621P
(REV. 9-75)
(FORMERLY IA-1014)

U.S. DEPARTMENT OF COMMERCE
DOMESTIC AND INTERNATIONAL BUSINESS ADMINISTRATION
BUREAU OF EAST-WEST TRADE
OFFICE OF EXPORT ADMINISTRATION
WASHINGTON, D.C. 20230

Form Approved;
OMB No. 41-R2303

U.S. EXPORTER'S REPORT
OF REQUEST RECEIVED FOR INFORMATION, CERTIFICATION, OR OTHER ACTION INDICATING A RESTRICTIVE TRADE PRACTICE OR BOYCOTT AGAINST A FOREIGN COUNTRY

A. IMPORTANT - It is the policy of the United States to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States. All U.S. exporters of articles, materials, supplies or information are encouraged and requested to refuse to take any action, including the furnishing of information or the signing of agreements, that has the effect of furthering or supporting such restrictive trade practices or boycotts.

Accordingly, I encourage and request individuals and firms receiving such requests to refuse to comply with them.

Rogers C. B. Morton
Secretary of Commerce

B. INSTRUCTIONS: This form must be completed by a U.S. exporter whenever he is requested to take any action, including the furnishing of information or the signing of an agreement, which is designed to support a restrictive trade practice or boycott fostered or imposed by a foreign country against any other country not included in Country Group S, W, Y, or Z. (Country Groups are listed in Supplement No. 1 to Part 370 of the U.S. Department of Commerce Export Administration Regulations.) **Submission of this form is mandatory (50 USC App. 2403(b)). Failure to comply subjects the U.S. exporter to the penalties prescribed in Section (6) of the Export Administration Act of 1969, as amended.** It must be submitted to the U.S. Department of Commerce, Domestic and International Business Administration, Bureau of East-West Trade, Office of Export Administration, Washington, D.C. 20230, within **fifteen business days** from the date of receipt of such a request. Whenever a person receives more than one request for action with reference to the same transaction, only the first request need be reported to the Office of Export Administration (See Part 369 of the Export Administration Regulations).

C. CONFIDENTIAL. Information furnished herewith is deemed confidential and will not be published or disclosed except as specified in Section 7(c) of the Export Administration Act of 1969 as amended (50 USC app. 2406(c)).

1. Name and Address of U.S. Exporter submitting this report:

Name:

Address:

City, State, and Zip Code:

2. Exporter's Reference No. *(If any)*

3. Name of Country/ies against which the request is directed:

4. Date request was received by me/us:

5. I/We received this request from:

Name:

Address:

City and Country:

6. Specify type of request received. *(If any item in ab is checked, complete Item 7)*

a. [ ] Questionnaire *(Attach copy)*

b. [ ] Other type of request for information or action contained in:

[ ] Trade Opportunity [ ] Certificate of Origin [ ] Consular Invoice
[ ] Bid Specification [ ] Certificate of Manufacture [ ] Other *(Specify)* _____
[ ] Purchase Order [ ] Letter of Credit

7. If Item 6b above is checked, give the specific information or action requested. (Use direct quotations from the request.)

8. If the request relates to a specific transaction, describe the commodities or technical data involved. (The description of the commodity or technical data may conform to the description on the order or to usual commercial terminology, and may but need not be in terms of the Commodity Control List or Schedule B.)

Quantity	Description	Value

9. Additional Remarks:

10. Action:

a. [ ] I/We have not complied and will not comply with the request for information or action described above.

b. [ ] I/We have complied with, or will comply with, the request for information or action described above.

c. [ ] I/We have not decided whether I/we shall comply with the request for information or action described above and I/we will inform the Office of Export Administration within 5 business days of making a decision.

11. I certify that all statements and information contained in this report are true and correct to the best of my knowledge and belief.

Sign here in ink _____ Type or print _____ Date _____
(Signature of Person Completing Report) (Name and Title of Person whose Signature Appears on the Line to the Left)

USCOMM-DC 64196-P76

Congress of the United States
House of Representatives
Washington, D.C. 20515

October 2, 1975

Honorable Rogers Morton
Secretary of Commerce
Washington, D.C. 20230

Dear Mr. Secretary:

I congratulate you on your swift response to some of the questions raised at the September 22 Investigations Subcommittee hearing.

It is my hope that these actions you have taken (1) requiring companies to state whether they are or are not participating in the boycott; and (2) eliminating the form language, "but is not legally prohibited from taking" (action to further the Arab boycott), indicate a new effort by the Administration to reduce the impact of the Arab boycott and its harmful effects on American commerce.

I would like to know if the mandatory new requirement concerning participation in the boycott will apply to all companies that have filed forms previous to October 1, 1975, when they did not have to indicate whether or not they intended to comply with a boycott-related request. Will the exporters be requested to refile and fill in question No. 10?

I look forward to working with you to make a reality of our professed national opposition to the Arab boycott.

With every warm best wish,

Yours,

Jim H.

JAMES H. SCHEUER, M.C.

Congress of the United States
House of Representatives
Washington, D.C. 20515

19 March 1975

The Honorable John Moss
Chairman
Committee on Interstate and Foreign
Commerce
Subcommittee on Oversight and Investigations
2323 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am concerned about the repeated, serious and reliable reports of Arab boycotting and economic discrimination against Jewish and other members of the U.S. business community, both at home and abroad.

In this regard, I am enclosing a copy of a February 25, 1975 letter and enclosure I received from the Chairman of the Securities and Exchange Commission, together with selected clippings from the New York Times and Washington Post, as well as an article from Newsweek.

I would appreciate your giving consideration to having the Subcommittee on Oversight and Investigations conduct an inquiry into the facts of this matter, since it clearly falls within the jurisdiction of the Interstate and Foreign Commerce Committee

Such hearings could elicit testimony on possible violations of Federal anti-trust statutes, as well as the adequacy of enforcement of existing statutes, and the need for additional legislation.

If you approve, I will get in touch with knowledgeable members of the business community to elicit as many accurate, pertinent reports as possible for the use of the Subcommittee.

In the interim, subject to your approval, I shall also query the Securities and Exchange Commission on what concrete action the National Association of Securities Dealers has taken with respect to the Arab boycott; what reports the Securities and Exchange Commission has received from Treasury Under Secretary Jack Bennett and from the Justice Department; what further information on this matter the Securities and Exchange Commission itself has developed; and, finally, to explore more fully the Commission's own authority under the Federal securities laws to help on this matter.

Again, John, I should be very grateful for your leadership on this matter. The Subcommittee could provide an ideal hearings and investigation forum. The United States must not become a battle-ground for Arab economic warfare.

With every warm best wish,

Yours,

JAMES H. SCHEUER, M.C.

APPENDIX O

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., October 24, 1975.

Hon. EDWARD H. LEVI,
Attorney General of the United States,
Washington, D.C.

DEAR MR. ATTORNEY GENERAL: As you know, on September 22 Secretary of Commerce Rogers C. B. Morton refused to comply with a duly issued subpoena of this Subcommittee. This action, in my opinion, placed him in contempt of the Subcommittee and the Congress.

Secretary Morton based his refusal to comply with the subpoena on your Opinion dated September 4, 1975. While reliance on an incorrect legal opinion is not a defense to a citation for contempt of Congress (*Sinclair* v. *United States*, 279 U.S. 263, 299 (1929)), the Subcommittee has nonetheless looked into the question of the validity of your opinion.

I enclose for your information copies of the corrected transcripts of the Subcommittee's hearings of October 21 and 22, together with the Opinions of Professors Raoul Berger, Norman Dorsen, and Philip Kurland. I would very much appreciate your carefully reviewing this material and advising me whether you continue to believe your Opinion is correct.

Sincerely,

JOHN E. MOSS, *Chairman,*
Oversight and Investigations Subcommittee.

Enclosures.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., October 29, 1975.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for sending to me the corrected transcripts of the Subcommittee's hearings of October 21 and October 22, together with the opinions of Mr. Berger, Mr. Dorsen, and Mr. Kurland.

Of course, I am happy to carefully review this material, which I am now doing.

Sincerely,

EDWARD H. LEVI.

* * *

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., November 11, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Investigations and Oversight,
Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This letter is in reference to the hearings being conducted by the Oversight and Investigations Subcommittee

concerning Secretary of Commerce Morton's refusal to produce, in response to a subpoena of the House Committee on Interstate and Foreign Commerce, certain reports filed by private firms with the Department of Commerce pursuant to § 4(b) of the Export Administration Act of 1969, 83 Stat. 841, as amended, 50 U.S.C. App. 2403(b). In taking this action, Secretary Morton requested my opinion on a legal question bearing on his response. In the course of the Subcommittee's hearings, questions have been raised as to the legal merits of the opinion that I gave in answer to the Secretary's request. You have asked that I review the testimony before the Subcommittee and, in light of it, inform the Subcommittee whether I adhere to the opinion I have expressed.

In his letter of August 22, 1975, to Chairman Staggers, Secretary Morton stated that he would submit the reports to the Committee "subject only to deletion of any information which would disclose the identity of the firms, and the details of the commercial transactions involved." Because the Department of Commerce expressly had advised the firms which had submitted the reports that such information would remain confidential and because disclosure would, in the Secretary's view, expose the reporting firms to possible competitive injury and economic pressure, it was the Secretary's judgment that maintaining the confidentiality of the information "would not be contrary to the national interest and, in fact, that . . . disclosure might well be inconsistent with the national interest." The Secretary therefore concluded that under the terms of § 7(c) of the Act, 50 U.S.C. App. § 2406(c), disclosure of the information to the Committee was not justified.

Section 7(c) of the Act provides that:

No department . . . or official exercising any functions under this Act shall publish or disclose information obtained hereunder which is deemed confidential . . . unless the head of such department . . . determines that the withholding thereof is contrary to the national interest.

By letter to me of August 22, Secretary Morton requested my opinion as to whether he was correct in thinking that, before disclosing information to a Congressional committee as well as to the public generally, §7(c) requires him to determine that "withholding [would be] contrary to the national interest." Secretary Morton's request was forwarded to Assistant Attorney General Antonin Scalia, Office of Legal Counsel, to prepare a recommended response. See 28 C.F.R. § 0.25. In accordance with regular Department of Justice procedure, first established by Attorney General Stone and explained in Mr. Scalia's letter to you of October 21, the Office of Legal Counsel received a draft memorandum of law, prepared in the Commerce Department's Office of General Counsel, to serve as a starting point for the Office's independent research and consideration of the problem. After reviewing the Office of Legal Counsel's recommendation, I informed Secretary Morton by letter of September 4, 1975, that, in my judgment, § 7(c)'s requirements apply to disclosure to Congressional committees and that "the Committee is not entitled to receive the reports in question unless, in exercising the discretion granted by § 7(c), the [Secretary] determine[s] that withholding them would be 'contrary to the national interest.' "

I continue to adhere to the conclusion drawn in my letter. Because of the testimony you have sent to me, however, it may be useful for me

to provide further explanation of certain points. The question posed to me by Secretary Morton and addressed in my letter had nothing whatever to do with the applicability of executive privilege or the appropriateness of its assertion in this instance. The information that the Secretary has declined to disclose concerns only the identity of reporting firms and the details of commercial transactions reported in confidence to the Government. My opinion, therefore, had to do solely with the bearing of § 7(c) on the Secretary's response to the Committee's subpoena. The question turns on the proper construction of the section, which in turn depends on Congress' intent in enacting it. The section originally was enacted in its present form in 1949. 63 Stat. 7. The legislative history pertaining to the provision at the time of its original enactment was sparse. There is, however, legislative history bearing on the later reenactments, which I set forth in my letter to the Secretary. In addition to legislative history, I know of no way to determine congressional intent other than to look to the precise language—the statutory formula—Congress has chosen to employ, and to the meaning the formula was intended to have and is understood to have in other contexts. If Congress knows that certain forms of statutory language generally are taken as having a certain meaning, I assume that it would not employ the same language without intending that it be understood in the same way.

In his testimony, Mr. Kurland made the point, with respect to statutory interpretation, that there are three kinds of statutes: "one specifically says that Congress is not barred from access; a second specifically says that Congress is barred from access; and the third, on which the first two shed no light whatsoever, where Congress is silent." My own interpretation of the significance of the statutory pattern is different. So far as I can tell there is in fact no statute that simply and explicitly bars Congress from access. For example, 1 U.S.C. § 112b requires the transmission to Congress of international agreements other than treaties. The statute's explicit barring of disclosure to Congress, such as it is, goes only to the point that when the President believes that an agreement contains sensitive national security material, the statute directs him to transmit the agreement only to certain committees.

I believe the significance of the pattern of statutes in this area is that Congress has known how to make its intent clear in legislation when it intended information, otherwise confidential, nevertheless to be supplied to it. Since legislation that promises confidentiality speaks not only to the Executive, but particularly to the public where private interests are involved, I do not find it strange that the normal interpretation, where private interests are involved, is that the statute was intended to have its plain meaning, rather than to imply an exception for the Congress itself.

Like a number of other statutes, § 7(c), in contrast to § 112b, provides generally for the confidentiality of certain information obtained by the Executive from private sources, information that concerns, not Executive actions, but private individuals and firms. As I have indicated, neither § 7(c) nor, to my knowledge, any other statute expressly forbids supplying information to Congress or any of its committees. It is relevant to observe, however, that a provision comparable to § 7(c), dealing with similar private commercial informa-

tion obtained by the Government and vesting discretion to disclose in the President, had been interpreted by Attorney General Bonaparte in 1909 to apply as much to disclosure to Congressional investigative committees as it did to disclosure to the public. 27 Ops. A. G. 150 (1909). It should not have been unknown, then, to the Congress in 1949, when § 7(c) was enacted, that the section could be taken as having the same effect. That it was not unknown seems to me clear from the inclusion, in other statutes providing for the confidentiality of information collected by or supplied to the Government, of express exceptions for committees of the Congress. One of these, 26 U.S.C. § 6103, which limits disclosure of taxpayer returns, was enacted in very nearly its present form in 1926, 44 Stat. 51, 128. The statute's general confidentality provision, § 6103(a)(1), does not expressly prohibit disclosure to Congressional committees. One of the exceptions to the provision, § 6103(d), provides, however, that returns shall be furnished, on request, to "the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, or a select committee of the Senate or House specially authorized to investigate returns by a resolution of the Senate or House, or a joint committee so authorized by concurrent resolution.* * *" The necessary implication of § 6103(d)'s express exclusion of certain committees is that § 6103(a)(1) does apply to the Congress, despite its failure to refer to Congress expressly. In light of this, I do not see how it can be said that a restriction on disclosure to Congressional committees must, as a matter of construction, be express, and cannot be implied from generally applicable confidentiality provisions.

The point applies as well to 7 U.S.C. § 12-1, which, although otherwise vesting in the Secretary of Agriculture discretion to disclose the names of members of commodity boards of trade, requires disclosure "when requested by a Committee of either House of Congress, acting within the scope of its jurisdiction." That section was enacted in 1947, shortly before the original enactment of § 7(c). A large number of other confidentiality provisions, some enacted before § 7(c), and some after, expressly state that they do not authorize the Executive to withhold information from Congress. E.g., 15 U.S.C. §§ 78kkk, 80b-10 (b), 1945; 42 U.S.C. § 2454; 49 U.S.C. § 1504. Had Congress assumed that statutory confidentiality provisions in general have no application to its committees, it can have had no reason for expressly excepting its committees from the application of some such provisions but not of others.

These factors seem to me strongly to favor the view that, in enacting § 7(c), Congress assumed that it would apply to its own committees' requests for information obtained under the Act. Nor do I think that this is, in any way, an irrational intent to attribute to the Congress. The section's purpose seems to me clear. Although information about private firms' business transactions is indispensable to enforcement of the Act Congress presumably was aware that disclosure of such information might subject firms to risk of competitive injury and, to a greater degree than information about domestic business transactions, to a danger of economic reprisal. To encourage voluntary compliance with reporting requirements, and to ensure fairness to reporting firms, Congress, in enacting § 7(c), promised that the information obtained would be held in confidence unless the Secretary determined that, by

doing so, the national interest would be harmed. It does not seem to me unreasonable for Congress to determine that this promise should hold even as against its own committees, to judge that the Secretary, with knowledge of the precise nature of the information and of the positions of reporting firms, would be able, more certainly than a Congressional committee or its members, to identify the dangers that disclosure might present.

Subsequent events seem to me to reinforce this interpretation. You areare aware, I am sure, that, in the past, the Department of Commerce on occasion has referred to § 7(c) in declining to disclose to Congressional committees information obtained in confidence under the Act. These occasions led to proposals in 1962 in both the House and the Senate to make clear that § 7(c) does not prohibit furnishing information to Congressional committees. These efforts were unsuccessful, in major part because § 7(c) does not prohibit disclosure, but makes disclosure discretionary, and it has often been possible to work out accommodations between the committees' need for information and the necessity that certain information be maintained in confidence. See 108 Cong. Rec. 11480–41. Moreover, in the course of the congressional debates, doubts were expressed about the feasibility of segregating, by statute, information which fairly can be disclosed from that which cannot. *Id.*, at 11488.

That the Department has adhered to what appears to have been its previous interpretation of the statute is not, therefore, surprising. It has relied on its interpretation in assuring reporting firms of confidentiality, and reporting firms have, in turn, relied on this assurance. In short, in its repeated reenactment of § 7(c) Congress cannot have been unaware that the section was taken as applicable to its committees, or that, not only the Government, but private interests as well had acted in reliance upon that construction. If Congress had come to think that the promise of confidentiality did not extend, or should not extend, to the provision of information to its committees, it seems to me reasonable to suppose that its judgment would have been expressed in statute.

In the course of the Subcommittee's hearings reference has been made to a list, prepared by the Library of Congress' Congressional Research Service, of some one hundred statutes containing confidentiality provisions comparable to § 7(c). Fear has been expressed that if my interpretation of § 7(c) is correct, these other statutes could be invoked as justifying withholding by the Executive, to the serious detriment of congressional investigative efforts. With all respect, I think that these fears are greatly exaggerated. Some of the statutes the list contains, including some that I have mentioned above, expressly do not apply to disclosure to Congressional committees. Moreover, some of the statutes listed have been repealed. More important, however, the statutes contained in the list show wide variation in the form of language used and the purpose they serve. I would not be prepared to say that each necessarily applies to disclosure to Congress. The language, purpose or consistent interpretation may well mandate a contrary reading.

Even if, however, a statute does apply to disclosure to Congress, that does not necessarily mean that information cannot or should not be disclosed. Many of the statutes give to federal agencies a discretion to

disclose or not to disclose, often depending on their estimation of where the public interest lies. I would think that the public interest normally would weigh in favor of providing to Congressional committees information necessary for inquiries within the scope of their jurisdiction, at least so long as there is sufficient assurance that the confidentiality of the information will be preserved. My understanding is that such arrangements have often been possible, on a continuing or *ad hoc* basis. Indeed, the Commerce Department in the past has supplied certain information obtained under the Export Administration Act to Congressional committees. Moreover, as I understand it, Secretary Morton has in this instance supplied the Subcommittee a substantial amount of data, and has offered the Subcommittee individual firms, reports, deleting only identifying details.

Finally, these statutes protect only certain kinds of information—information that often concerns the most private of individual affairs. Many of the statutes, like § 7(c), concern private commercial information—trade secrets, customer lists, and the like. But others concern such matters as, for example: records of patients who have voluntarily committed themselves for treatment for veneral disease. 42 U.S.C. § 247c(e)(5) or narcotics addiction, 42 U.S.C. §260; social security returns, 42 U.S.C. § 1306(a)(d); and the names and records of juvenile delinquents, 42 U.S.C. § 5658. In many instances, such confidentially provisions do, of course, further governmental interests; without them, voluntary submission to the Government of sensitive personal information—information necessary to the operation of Government programs—probably would not occur. But their purpose is not to prevent congressional investigation of the Government's activities. It is to protect the privacy of individuals who have cooperated with the Government, individuals who, when a Congressional committee subpoenas information about them in the hands of Government agencies, will not have the opportunity to defend their interests and to explain to the committee the harm that disclosure might do, an opportunity that they otherwise would have. See Rule XI (k)(5), (7) of the *Rules of the House of Representatives*. I cannot believe that Congress, which has shown deep concern for individual privacy interests, would think this sort of protection of confidentiality inappropriate, even as against its own committees. Moreover, if the purpose of these statutes is to give assurances of confidentiality, not to the Government, but to private persons and firms, there is more reason than in most instances to give to the statutes the scope that their language indicates. Such persons often cannot readily consult legislative history to determine whether a statute, clear on its face, means something other than what it apparently says.

These, in any event, are the considerations on which my opinion to the Secretary was based. From the history recounted above, it is evident that my view of the matter is not a novel departure. Contrary to the view expressed by Mr. Berger in his testimony, I do not think that the statute, in limiting Congressional access, raises any constitutional question. nor does it involve any issue of Executive privilege. My interpretation of the statute expressly proceeds from an attempt to

deduce congressional intent. Far from being in derogation of the power of Congress, the statute, as I have interpreted it, seems to me simply an example of the responsible exercise of that power.

Sincerely yours,

EDWARD H. LEVI,
Attorney General.

APPENDIX P

THE SECRETARY OF COMMERCE,
Washington, D.C., October 1, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your letter of September 12, 1975, in which you requested that I furnish you with copies of tender documents containing Arab boycott-related provisions which the Department had disseminated to U.S. business, instances of such dissemination (I assume this to be a request for the names of recipient firms), and copies of covering letters used for such dissemination.

Enclosure I explains Commerce Department procedures for handling trade opportunities. This statement provides an explanation for the relatively small number of documents responsive to your request which are currently contained in our files.

The documents submitted under Enclosures II–IV are the product of a thorough file search by units of the Department which handle and disseminate bid documents which might contain boycott-related provisions. They include nine tenders for which we have records of dissemination by mail, along with available names of firms to which they were sent; two tenders which our records indicate were inspected by firms in Commerce offices; and eight tenders for which Commerce has no record of dissemination or inspection. Also enclosed are copies of sample form letters sometimes used in transmitting bid documents to U.S. firms (Enclosure V).

I trust that the enclosed documents will meet your requirements.

Sincerely,

ROGERS MORTON,
Secretary of Commerce.

Enclosures.

I. Department of Commerce Procedures for Handling Trade Opportunities and Bid Documents.

II. Tenders or trade opportunities containing boycott-related requests, with lists of firms to which sent.

III. Tenders containing boycott-related requests which U.S. firms have read in Commerce offices.

IV. Tenders containing boycott-related requests which Commerce has no record of having distributed.

V. Sample form letters sometimes used to transmit bid documents.

Enclosure I

Department of Commerce Procedures for Handling Trade Opportunity and Bid Documents

Enclosures II–IV contain all trade opportunity or bid tender documents containing Arab boycott-related provisions which were retained in Commerce files as of September 26, 1975. These documents emanated from the following units of the Department which process such documents:

BUREAU OF INTERNATIONAL COMMERCE

Commerce Action Group for the Near East (CAGNE).—This unit was formed in July 1974 with general country responsibiilty for Iran, Israel, and most, but not all, of the Arab countries. CAGNE handles only business opportunities of the "major project" type for these countries. These opportunities come, in most cases, in the form of "early warning" notices of proposed projects prior to the time the project is actually tendered. In such cases, appropriate U.S. firms are alerted, most often consulting or engineering firms rather than contractors or equipment suppliers, so that interested firms may begin negotiations at the pre-tendering phase of a project. In most such cases, CAGNE never receives subsequent tender documents. Only a small number of actual tender documents of the type which might contain boycott-related provisions are received in CAGNE.

Major Export Projects Division (MEPD).—This unit handles "major project" opportunities of the type described immediately above for all but CAGNE countries. These would include Mauritania, Somalia, and Sudan which, although members of the Arab League, are not assigned to CAGNE.

Overseas Business Opportunities Division.—This unit for the most part processes telegraphic trade opportunities and does not disseminate tender documents of the type which might contain boycott-related provisions (see the discussion below on procedures).

BUREAU OF DOMESTIC COMMERCE

The various functional industry divisions of the Bureau of Domestic Commerce (BDC) disseminate special trade opportunities which are neither major projects nor suitable for inclusion in the computerized trade opportunities program of the Overseas Business Opportunities Division.

* * * * * * *

The following discussion of our procedures for handling trade opportunity and tender documents is organized according to the three elements of the request in the September 12, 1975 letter from Chairman John E. Moss.

A. Business opportunity documents which may contain boycott-related provisions

By far the great majority of business opportunities received from Arab countries are routine product sales opportunities, which are processed through the Trade Opportunities Program (TOPS) of the

Overseas Business Opportunities Division. Such trade opportunities are transmitted to Commerce telegraphically by foreign service posts in a standardized format—brief answers to fourteen specific questions—prescribed by the Department. These opportunities are computerized and disseminated to appropriate subscriber firms according to their product category interests. Such opportunities, as received by Commerce, *do not* contain boycott-related provisions, and in most cases they contain sufficient information for a direct response by the U.S. firm. In those instances where tender documents are received as a follow-up to the telegraphic opportunity, such documents are forwarded to the appropriate functional unit for dissemination or other handling (i.e., CAGNE, BDC).

Special product sales opportunities reported by telegram or airgram from U.S. embassies which cannot appropriately be fitted to the TOPS format are disseminated by the industry divisions of BDC, which assign action to their industry specialists. Depending on his assessment of the value of the opportunity and his current workload, the specialist may take any or all of the following actions: (1) write up the opportunity for publication in *Commerce Today* or *Commerce Business Daily;* (2) transmit the opportunity directly to companies known to have the capability to produce or supply the product; (3) forward the opportunity to appropriate trade associations for their dissemination to interested member companies; or (4) hold the opportunity and send it out only upon request. CAGNE specialists follow similar procedures in handling "major projects" opportunities. As with the TOPS telegrams, such initial trade opportunity reports customarily do not contain boycott-related provisions.

It should be emphasized that in most cases, tender documents of the type which might contain boycott-related provisions do not accompany the initial trade opportunity report. The usual procedure is for the initial report to refer the U.S. firm to a source in the originating country for tender documents or other information which may be needed in order for the firm to respond. In such cases, Commerce never receives the tender documents. To reiterate, the number of instances in which tender documents which might contain boycott-related provisions are received in the Department represents a very small percentage of the total number of trade opportunities handled.

Trade opportunity documents are customarily destroyed after they have been processed and disseminated or after the bid deadline has expired. In some cases, they may be held in the files for a longer period—e.g., to allow for the possibility of firms requesting assistance in getting an extension of the bid deadline—and then destroyed after a suitable period of time has elapsed. This period will vary according to the preferences of the individual specialist involved. This procedure is designed to eliminate the administrative burden of filing, storing, and maintaining a large volume of documents which are essentially deadwood. Instances of any need to refer back to an expired opportunity are very rare. This procedure accounts for the fact that none of the enclosed documents predate June 1974.

B. Firms to which tender documents containing boycott-related provisions have been disseminated

The method of disseminating tender documents to U.S. firms varies with the nature and importance of the opportunity and with the

individual specialist handling them. Some such documents may be disseminated by mail to a number of firms. In other cases, availability of the documents may be advertised in *Commerce Today* or *Commerce Business Daily*, or communicated to appropriate firms by telephone or mail, with an invitation for the firms to inspect the documents in the responsible Department of Commerce office. Depending on workloads and other considerations, a record may or may not be kept of firms to which an individual document is sent or which inspect the document in the Department. Enclosures II and III contain the names of all the firms to which, *according to Department of Commerce records*, the enclosed documents were made available. This is not meant as an assurance, however, that these records contain the names of all firms which may have, in fact, been provided access to these particular documents. It is entirely possible that these documents were sent to, or were inspected by, additional firms for which no record was kept. As you will note, the Department has no record of the firms, if any, to which eight of the attached documents were made available (Enclosure IV).

C. *Covering letters transmitting tender documents containing boycott-related provisions to U.S. firms*

The Department has not developed any special covering letter for transmitting trade opportunity notices or tender documents from Arab countries. Practice varies according to operational units and individual specialists. CAGNE specialists, when mailing out tender documents to firms, do not use a covering letter but merely attach a handwritten transmittal slip of which no duplicates are retained. Various elements of BDC have developed form letters for transmitting such documents from any source. Where such letters could be identified as having been used to transmit one of the enclosed documents, it is joined to the document in the enclosures. Copies of other such form letters located in BDC files are included as a separate enclosure.

One instance of such a form letter deserves special notice. In his letter of August 11, 1975 to Secretary Morton, Mr. Seymour Graubard of the Anti-Defamation League took issue with the Department's dissemination of trade opportunity documents containing boycott-related provisions. He enclosed a copy of Iraq tender number 6/75 for 3,550 precast houses; attached to this tender was a form transmittal letter signed by Mr. Charles Pitcher of BDC. Mr. Pitcher has no record of having disseminated this tender, and in our division of responsibility, it is unlikely that he would have done so. We know, however, that CAGNE sent this tender to some eighty firms. We believe that a U.S. firm received the form letter from Mr. Pitcher as an initial announcement of this, or another, trade opportunity, and that when it later received the Iraq tender document from CAGNE, it somehow matched them incorrectly. It is for this reason that the Pitcher letter is not joined with this particular tender document in the enclosures; it is, however, included in the separate enclosure with copies of other form letters used by BDC.

ENCLOSURE II

Tenders or trade opportunities containing boycott-related requests disseminated by Commerce, together with lists of the firms to which they were sent:

1. Iraq—Precast Housing.
2. Syria—Factory for Machine-Made Woolen Carpets.
3. Mauritania—Paved Road Construction.
4. Egypt—Railway Ties.
5. Egypt—Paper Tape Rolls.
6. Iraq—Electro-lab Apparatus.
7. Iraq—Surgical Urinary Equipment.
8. Iraq.--Laboratory Equipment.
9. Saudi Arabia—Truck Dealership.

ENCLOSURE III

Tenders containing boycott-related requests which U.S. firms have read in Commerce offices:

1. Egypt—Construction of a National Energy Control Center.
2. Iraq—Baghdad Rapid Transit System.

ENCLOSURE IV

Tenders containing boycott-related requests which Commerce has no record of having distributed (for a variety of reasons, including lateness of arrival):

1. Syria—Worsted and Semi-worsted Spinning Plants.
2. Syria—Plant to produce Cotton Yarn from Cotton Waste.
3. Syria—Refrigerated Potato Stores.
4. Egypt—Presticides.
5. Iraq—Medical Supplies.
6. Iraq—Sodium Sulphate.
7. Egypt—Liquified Chlorine Gas.
8. Iraq—Paints.

ENCLOSURE V

Sample form letters sometimes used to transmit bid documents:

* * *

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., October 24, 1975.

Hon. ROGERS C. B. MORTON,
Secretary of Commerce, Department of Commerce, Washington, D.C.

DEAR MR. SECRETARY: On September 22, 1975, you appeared before the Subcommittee on Oversight and Investigations and refused to comply with a duly issued subpoena. This, in my opinion, placed you in contempt of the Subcommittee and the Congress.

At that time, you based your decision on an Opinion dated September 4, 1975, from the Attorney General, advising you that under the provisions of Section 7(c) of the Export Administration Act, it was not necessary for you to comply with the Subcommittee's subpoena. During the hearing of September 22, I advised you that your position was unfounded and the Subcommittee would consider recommending a contempt citation based on your actions.

While reliance on an opinion of counsel which is legally incorrect is not a defense to a contempt citation (*Sinclair* v. *United States*, 279 U.S. 263, 299 (1929)), the Subcommittee thereafter determined to consider the validity of the Attorney General's Opinion. For that purpose, the Subcommittee heard testimony on October 21 and 22 from Professors Raoul Berger, Norman Dorsen, and Philip Kurland, regarding the issues involved. Copies of the Opinions, together with copies of the transcripts, of those two days of hearings are enclosed.

I would now request that you fully review the opinions and transcripts regarding your noncompliance and the validity of the Attorney General's Opinion. When you have had an opportunity to do this, it is our intent to call you again before the Subcommittee. Since you remain subject to the Subcommittee's subpoena of July 28, the staff of the Subcommittee will be in touch with your office to arrange an appropriate date for a continuation of the hearing.

Sincerely,

JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee.

Enclosures:
Transcripts of October 21 and 22.
Statement of Raoul Berger.
Statement of Norman Dorsen.
Statement of Philip Kurland.

* * *

U.S. DEPARTMENT OF COMMERCE,
OFFICE OF THE SECRETARY,
Washington, D.C., October 24, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Secretary Morton asked me to acknowledge your letter of today, which was hand delivered to his office this afternoon, in further regard to the Arab-Israel boycott subpena.

You may be assured, as always, that your letter will receive his personal attention.

Sincerely,

JAMES M. SPARLING, JR.,
Assistant to the Secretary for Congressional Affairs.

U.S. DEPARTMENT OF COMMERCE,
OFFICE OF THE SECRETARY,
Washington, D.C., November 6, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Government Operations, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Secretary Morton has asked me to acknowledge your letter dated November 5 confirming the request that the Secretary appear before your Committee on November 11, 1975, at 10 a.m., pursuant to the Subcommittee subpoena issued July 28, 1975.

You may be assured that Secretary Morton will be present before your Subcommittee on November 11.

Sincerely,

JAMES M. SPARLING, JR.,
Assistant to the Secretary for Congressional Affairs.

* * *

THE SECRETARY OF COMMERCE,
Washington, D.C., November 10, 1975.

Hon. JOHN E. MOSS,
Chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further response to your letter of September 19, 1975, in which you enclosed copies of seven documents made available to the Oversight and Investigations Subcommittee that contain boycott-related provisions subject to the reporting requirements of Section 369.2 of the Export Administration Regulations. These documents identified certain firms, and you have requested copies of all the reports filed since 1970 by those firms, and in the event reports were not filed, you have also requested to be informed of that fact.

The delay in my response is due to the fact that one of the documents, the letter of credit from the Central Bank of Libya, did not identify the exporter. Under Section 369.2 of the Export Administration Regulations, in order to avoid duplicate reporting of the same transaction, service organizations such as banks, forwarding agents and shipping lines are required to inform the U.S. exporter of the boycott-related provisions, but the exporter is the party required to report to the Department. Thus, before we could ascertain whether or not a report had been filed in connection with that particular transaction, it was necessary for us to ascertain the identity of the exporter involved. This has now been done.

The results of our investigation are as follows: Two of the seven boycott-related provisions contained in the documents were reported

to the Department. However, the firm submitting one of these reports was found to have received another request for boycott-related action in May of 1975 after it had been specifically notified of the reporting requirements. It did not file a report covering this second request until some ninety days after the deadline for reporting specified under our Regulations. Charges are currently pending against the exporter involved in this untimely report. The five other boycott-related provisions had not been reported. Charges are pending against one of these delinquent exporters and warning letters have been issued to the other four. The decision to issue charging letters to two of the exporters, but to transmit only warning letters to the four others, is predicated on the fact that only the two exporters charged are known to have been mailed copies of our Export Administration Regulations.

You have requested copies of all reports filed since 1970 by the firms identified in your letter. As you know, the information contained in such reports is subject to the confidentiality provisions of Section 7(c) of the Export Administration Act. Although you have already identified six of the seven exporters, compliance with your request would involve my disclosing the details of all commercial transactions reported by such firms since 1970, and not merely those disclosed in the documents enclosed in your letter. For the reasons which I explained in my letters of July 24 and August 22, as well as during my appearance before your Subcommittee on September 22, I am unable to determine that withholding such information is contrary to the national interest. Accordingly, I must respectfully decline your request.

In closing, however, I want to thank you for bringing the cases above to our attention so that appropriate remedial action could be taken.

Sincerely,

ROG MORTON, *Secretary of Commerce.*

APPENDIX Q

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C., October 29, 1975.

Mr. ROBERT W. SARNOFF,
Chairman of the Board, RCA Corp., 30 Rockefeller Plaza, New York, N.Y.

DEAR MR. SARNOFF: The Subcommittee on Oversight and Investigations is currently investigating boycotts and similar impediments on domestic commerce imposed by foreign governments, corporations, or citizens. This investigation is being conducted pursuant to our oversight responsibilities under the authority of Rules X and XI of the Rules of the House of Representatives and the Legislative Reorganization Act (2 USC § 190d).

We are particularly concerned with the impact on domestic commerce of the Arab boycott against Israel. Therefore, I was particularly interested in a July, 1975, *Fortune* magazine article which said that the RCA Corporation has been placed on the boycott list because it

has done business with Israel as well as Arab countries. The article contained this statement from an unnamed RCA executive at page 170: "(We) are not going to end relations with Israel to get an Arab contract. This is a moral issue."

Accordingly, I would appreciate learning from you whether the RCA Corporation has lost business as the result of being placed on the boycott list, and, if so, to what extent. I would appreciate as much detailed information in response to this inquiry as possible.

Sincerely,

JOHN E. MOSS, *Chairman,*
Oversight and Investigations Subcommittee.

* * *

RCA,
Washington, D.C., November 7, 1975.

Hon. JOHN E. MOSS,
Chairman, Oversight and Investigations Subcommittee, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This will acknowledge your letter of October 29, 1975 with respect to the Arab Boycott against Israel. The article you quoted in the second paragraph of your letter accurately states the position of RCA Corporation. As stated in the article we are a world-wide communications company prepared to do business everywhere our Government permits. Prior to the imposition of the Arab Boycott against Israel our shipments to the Arab nations were averaging in excess of 10 million dollars a year and we would have expected this figure to increase. However, as a result of the Boycott our current sales to the Arab nations are less than a million dollars. During this period RCA has not altered its business relations with Israel. However, in line with our policy of doing business throughout the world we continue our policy of soliciting business from the Arab countries.

RCA's position with respect to the Boycott is very clearly stated in a letter which our Chairman, Mr. Robert Sarnoff, along with the Chief Executives of seven other American companies, sent to the Secretary of State. I am enclosing for your information a copy of the letter to the Secretary and the State Department's reply.

Very truly yours,

CHARLES R. DENNY.

Enclosure.

JULY 12, 1974.

Hon. HENRY A. KISSINGER,
Secretary of State,
Washington, D.C.

MY DEAR MR. SECRETARY: As Americans and members of the business community, we congratulate you on the diplomatic achievement that gives the world new hope for peace in the Middle East. It is an accomplishment that will always reflect credit on the steadfastness of this Administration's foreign policy and the skill with which it has been executed.

As efforts go forward to develop normal relationships in the Middle East, it appears to us that there is no longer a place for the Arab boycott against U.S. companies which, as part of their normal international activity, have been engaged in business with customers in Israel. The companies we represent are among those currently on the Arab boycott list. We earnestly hope that you will use your best efforts to persuade the Arab nations that the new role of the United States in the Middle East and the new climate of diplomatic accom-

modation in the region would be well served by an end to these discriminatory commercial barriers.

We believe that such a development will free these companies and others to participate in technological and commercial exchange between the United States and the Middle East and would mark a significant step in nurturing the spirit of coexistence that has begun to appear as a result of your arduous efforts.

We wish you every success in building upon the historic foundation you have achieved for peace.

Sincerely yours,

ARTHUR R. TAYLOR,
President, CBS Inc., New York, N.Y.

J. PAUL AUSTIN,
Chairman of the Board, The Coca-Cola Co., Atlanta, Ga.

HENRY FORD II,
Chairman of the Board and Chief Executive Officer, Ford Motor Co., Dearborn, Mich.

CHARLES H. SOMMER,
Chairman of the Board, Monsanto Co., St. Louis, Mo.

ROBERT W. GALVIN,
Chairman of the Board, Motorola Inc., Chicago, Ill.

ROBERT W. SARNOFF,
Chairman of the Board and Chief Executive Officer, RCA Corp., New York, N.Y.

WILLIAM J. DE LANCEY,
President and Chief Executive Officer, Republic Steel Corp., Cleveland, Ohio.

JOHN H. PLATTS,
Chairman of the Board and President, Whirlpool Corp., Benton Harbor, Mich.

* * *

UNDER SECRETARY OF STATE FOR POLITICAL AFFAIRS,
Washington, October 3, 1974.

Mr. ROBERT W. SARNOFF,
Chairman of the Board and Chief Executive Officer, RCA Corp., New York, N.Y.

DEAR MR. SARNOFF: Secretary Kissinger has asked me to reply to the letter of July 12 that you sent him jointly with the chief executive officers of seven other companies regarding the Arab boycott of Israel.

We appreciate the expression of congratulations for what has been accomplished so far toward a Middle East peace. A fragile beginning has been made, and we are working to ensure that the opportunity presented for progress is not lost. In this regard, we share the view expressed in your letter to Secretary Kissinger that abolishing the boycott would mark a significant step in nurturing that progress and the still nascent spirit of coexistence in the area.

I want to assure you that we will continue to encourage the Arab governments to lift the Arab boycott against US companies. We will proceed in this fashion regardless of the fact that we know that the Arab side will not lightly give up what they see as a very important negotiating card. This matter is seen by the Arabs as too closely associated with the basic elements of the Arab-Israeli conflict to be dealt with except as progress is made toward resolution of these elements.

Several of the firms represented by the letter to the Secretary have been in touch with Department Officers on several occasions during

recent months to discuss the Arab boycott. These discussions and exchanges of views and information have been useful for us. We recognize the role that American companies can play in the exchange of technology and commerce with Middle East countries. The commitment there to economic development can promote the normalization of relations and we want to do all we can to enhance that development in the Middle East.

I hope that representatives of your company and those of other concerned companies will maintain their contacts with Department officers so that we can continue the exchange of views and information to our mutual benefit.

Sincerely yours,

JOSEPH J. SISCO.

APPENDIX B

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE.
Washington, D.C., October 17, 1975.

To: Hon. John Moss, chairman, Subcommittee on Oversight and Investigations, Committee on Interstate and Foreign Commerce.
From: American Law Division.
Subject: Some Federal statutes that might have some relevance to some aspects attributed to possible attempts to implement or conform to the Arab boycott against Israel.

This memorandum is submitted in response to your request for information on the above-stated subject. A brief examination of Federal legislation has revealed a number of statutes which might have some relevance to a discussion or consideration of purported practices occurring in the United States or without the United States affecting the United States, which may be attributed to the Arab boycott. This is no intended to be an exhaustive list of such laws, and should not be considered as such. Likewise, no value or opinion is expressed as to any relevance or value of any of these statutes, in whole or in part, as to any particular practice or practices. Any definitive interpretation as to the application of any of these laws or any other law not mentioned herein can only be made by a court of law in relation to a given fact situation. Each of the statutes selected is summarized below and is followed by the text thereof.

ANTITRUST LAWS

Section 1 of the Sherman Act, 15 U.S.C. § 1, declares that contracts, combinations and conspiracies in restraint of trade or commerce among the several States or with foreign nations, are illegal.

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intra-

state transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides that monopolizing or attempting to monopolize, or combining or conspiring with any other person to monopolize any part of the trade or commerce among the several States or with foreign nations is a felony.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), declares unfair methods of competition, and unfair or deceptive acts or practices in or affecting commerce, as illegal.

"Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

Section 5(a)(6) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(6), empowers and directs the Federal Trade Commission to prevent persons, partnerships or corporations, except for special entities regulated by other agencies, from using unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.

"The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

Section 6(h) of the Federal Trade Commission Act, 15 U.S.C. § 46(h), empowers the Federal Trade Commission to investigate for-

eign countries where associations, combinations, or practices of manu-
States.

"To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Provided, That the exception of "banks and common carriers subject to the Act to regulate commerce" from the Commission's powers defined in clauses (a) and (b) of this section, shall not be construed to limit the Commission's authority to gather and compile information, to investigate, or to require reports or answers from, any person, partnership, or corporation to the extent that such action is necessary to the investigation of any person, partnership, or corporation, group of persons, partnerships, or corporations, or industry which is not engaged or is engaged only incidentally in banking or in business as a common carrier subject to the Act to regulate commerce."

CIVIL RIGHTS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., prohibits a broad range of unlawful employment practices by any private employer enagaged in an industry affecting commerce who has 15 or more employees. Sec. 703(a), 42 U.S.C. § 200e-2(a), makes it an unlawful employment practice to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's religion or national origin; or to limit, segregate, or classify employees in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's religion or national origin.

"*Employers*. It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Sec. 703(e), 42 U.S.C. § 2000e-2(e), provides that discrimination in hiring or employment on the basis of religion or national origin is not unlawful under circumstances where such factor is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or enterprise.

INTERNATIONAL TRADE

Section 3(5) of the Export Administration Act of 1969, 50 App. U.S.C. § 2402(5), states that it is the policy of the United States to

oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States and to encourage and request domestic exporters to refuse to take any action to foster same.

"It is the policy of the United States (A) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries against other countries friendly to the United States, (B) to encourage and request domestic concerns engaged in the export of articles, materials, supplies, or information, to refuse to take any action, including the furnishing of information or the signing of agreements, which has the effect of furthering or supporting the restrictive trade practices or boycotts fostered or imposed by any foreign country against another country friendly to the United States, and (C) to foster international cooperation and the development of international rules and institutions to assure reasonable access to world supplies."

Section 3(7), 50 App. U.S.C. § 2402(7), states that it is the policy of the United States to use export controls to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have been imposed for purposes of influencing United States foreign policy.

"It is the policy of the United States to use export controls, including license fees, to secure the removal by foreign countries of restrictions on access to supplies where such restrictions have or may have a serious domestic inflationary impact, have caused or may cause a serious domestic shortage, or have been imposed for purposes of influencing the foreign policy of the United States. In effecting this policy, the President shall make every reasonable effort to secure the removal or reduction of such restrictions, policies, or actions through international cooperation and agreement before resorting to the imposition of controls on the export of materials from the United States: *Provided*, That no action taken in fulfillment of the policy set forth in this paragraph shall apply to the export of medicine or medical supplies."

Section 337(a) of the Tariff Act of 1930 (as amended by the Trade Act of 1974), 19 U.S.C. § 1337(a), declares that unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale, the effect of which is to destroy or substantially injure an industry, efficiently and economically operated in the United States, or to restrain or monopolize trade and commerce in the United States, is unlawful.

"Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section."

Section 73 of Title 15, United States Code, provides for a special double duty where an article produced in a foreign country is imported into the United States under any agreement, understanding, or condition that the importer or any other person shall not use, pur-

chase, or deal in, or shall be restricted in his using, purchasing, or dealing in, the articles of any other person.

"If any article produced in a foreign country is imported into the United States under any agreement, understanding, or condition that the importer thereof or any other person in the United States shall not use, purchase, or deal in, or shall be restricted in his using, purchasing, or dealing in, the articles of any other person, there shall be levied, collected, and paid thereon, in addition to the duty otherwise imposed by law, a special duty equal to double the amount of such duty: *Provided*, That the above shall not be interpreted to prevent the establishing in this country on the part of a foreign producer of an exclusive agency for the sale in the United States of the products of said foreign producer or merchant, nor to prevent such exclusive agent from agreeing not to use, purchase, or deal in the article of any other person, but this proviso shall not be construed to exempt from the provisions of this section any article imported by such exclusive agent if such agent is required by the foreign producer or if it is agreed between such agent and such foreign producer that any agreement, understanding or condition set out in this section shall be imposed by such agent upon the sale or other disposition of such article to any person in the United States."

DANIEL HILL ZAFREN,
Legislative Attorney.

APPENDIX 8

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
OF THE COMMITTEE ON INTEREST AND FOREIGN COMMERCE,
Washington, D.C.

MEMORANDUM OF LAW

Date: October 17, 1975.
To: Michael R. Lemov, Chief Counsel.
From: Kirk Smith, Special Assistant.
Subject: Are Arab Boycott Practices Actionable Under Federal Antitrust Laws?

The purpose of this memorandum is to discuss why Arab boycott practices could be actionable under the Sherman Antitrust Act and the Federal Trade Commission Act as well as why the subject matter falls within the jurisdiction of the Subcommittee on Oversight and Investigations.

A discussion of the legality of the Arab boycott in terms of American antitrust law presents problems. There is no case law precisely on this question. And the determination of whether acts in a given case are unlawful is, of course, a question ultimately answered by the courts. Evidence of the practices has also been difficult to obtain.

However, this memorandum analyzes what is known about the Arab boycott in light of American antitrust law and concludes that some of the methods of implementing the boycott would be actionable as an antitrust offense insofar as they affect the free flow of trade in the United States.

BOYCOTT PRACTICES

According to generally known information,[1] the following is an outline of the various methods of implementing the Arab boycott:

(1) Arab government, companies and nationals agree not to do business in Israel or with the government, companies or nationals of Israel.

(2) An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from doing business in Israel or with the government, companies or nationals of Israel.

(3) An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from doing business with any American company engaged in trade in or with Israel, its companies or nationals.

(4) An American company, as a condition of doing business with an Arab government, company or national agrees to refrain from doing business with any company whose ownership or management is predominantly Jewish and to remove or refrain from selecting corporate directors who are Jewish.

(5) An American seller to Arab governments, companies or nationals agrees, as a condition of the sale, to ship its products only on carriers which are not on the Arab boycott list and banks agree to honor letters of credit requiring evidence that these restrictions have been met.

(6) An American company, as a condition of doing business with an Arab government, company or national, agrees to refrain from hiring or promoting Jewish employees or dismiss Jewish employees.

Since the method covered in Item 1, above, does not touch American soil and, in turn, United States commerce, it is not subject to American law. The practices covered in Item 6, above, are violative of various laws prohibiting employment discrimination including Title VII of the Civil Rights Act of 1964. But discriminatory employment practices also raise restraint of commerce problems and those implications are discussed in this memorandum.

SUBCOMMITTEE JURISDICTION

The various boycotting practices described in Items 2, 3, 4, and 5, above, as well as some aspects of 6, clearly affect the free flow of trade in United States commerce and are, therefore, within the jurisdiction of the Interstate and Foreign Commerce Committee.[2] Accordingly, the Committee's Oversight and Investigations Subcommittee has the authority to seek answers to such questions [3] as:

What is the economic impact of these practices on domestic commerce? To determine the economic impact of these practices it is necessary to find out not only how many American firms have been asked to comply with the boycott, but also to ascertain how many have actually complied. Other questions include: How many contracts or sales in terms of dollars have been subject to boycott agreements? How many

[1] This outline is also covered in the staff's memorandum of September 2, 1975, and is based on information obtained by the American Jewish Congress, as well as the Arab boycott regulations drafted by the General Union of Chambers of Commerce, Industry and Agriculture for Arab Countries, Beirut, Lebanon.

[2] *See* 2 U.S.C. § 190d, and Rules of the House of Representatives.

[3] *See* 2 U.S.C. § 190d, and *Watkins* v. *United States*, 354 U.S. 178, 187 (1957).

firms have refused to comply and, thereby lost business with certain Arab nations or companies? What kinds of products and goods have been included in these transactions, or lost transactions as the case may be?

In addition, the subcommittee has the authority to determine what laws may be needed to deal with the impact of the Arab boycott on domestic commerce and also, for that purpose, to review what laws have already been enacted and whether or not they are being enforced. The remaining segments of this memorandum discuss the applicability of antitrust laws to the Arab boycott.

SHERMAN ANTITRUST ACT

Section 1 of the Sherman Antitrust Act [4] declares illegal any contract, combination or conspiracy in restraint of trade. In *Standard Oil Co.* v. *United States*,[5] the Supreme Court held Section 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable.

The Court construed Section 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . ." [6] The Court said that the effect of both sections was to adopt the common law proscription against all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce.[7]

The Court expanded upon these precepts to hold that there are some agreements whose validity depends on the surrounding circumstances in which they are made and applied, and that there are "classes of restraints which from their 'nature or character' were unduly restrictive and hence forbidden by both the common law and the statute." [8]

Boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[9] The test used in *Klor's* is whether the conduct in question "interferes with the natural flow of interstate commerce." [10] And the Court has said that a boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." [11] The Court has also said that the Act is to ensure that "each and every business, no matter how small . . . [has] the freedom to compete—to assert with vigor, imagination, devotion and ingenuity whatever economic muscle it can muster." [12]

The Arab boycott practices, on their face, constitute concerted conduct among traders to refuse to do business with other traders, and, accordingly, fall within the scope of the Sherman Act. Group boy-

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[4] 15 U.S.C. 1-7.
[5] 221 U.S. 1, 59-60 (1911).
[6] *Id.* at 61.
[7] *Id.* at 57, 61; *Eastern States Lumber Assn.* v. *United States*, 234 U.S. 600, 609 (1914); *Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207, 211 (1959).
[8] *Standard Oil Co.*, *supra*, at 58, 61; *Klor's supra*, at 211.
[9] *See e.g.*, *Eastern States Lumber Assn.* v. *United States*, 234 U.S. 600 (1914); *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Northern Pacific R. Co.* v. *United States*, 356 U.S. 1, 5 (1958).
[10] *Klor's*, *supra*, at 213.
[11] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466 (1941).
[12] *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

cotts, defined as a concerted refusal by traders to deal with other traders, have been held to be a *per se* violation of the Act.[13]

The prohibition against boycotts has also been applied to concerted refusals to hire particular groups of individuals.[14] In the *American Medical Association* case, for example, doctors who participated in prepaid medi . plans were expelled from the society and efforts were directed tow d pressuring various groups not to do business with these expelled members. The Supreme Court held that the Sherman Act made such activity unlawful. Accordingly, a concerted refusal to trade with persons who are Jewish or firms which have persons who are Jewish as members of their boards of directors or with controlling stock, would be conduct apparently prohibited by the Act.

Therefore, to the extent that the imposition of a boycott interferes with the "freedom to compete" among American firms and otherwise hampers the "natural flow" of commerce, such a practice would be the kind of conduct intended to be covered by the Sherman Act. The Arab boycott practices that would be actionable under the Act include agreements made by American firms to refrain from doing business in Israel, or with other American firms who do business with Israel, or persons who have expressed support for Israel or who are Jewish. Also actionable would be the concerted refusal by American firms participating in the boycott to hire Jewish employees or to dismiss them.

In this connection, it is relevant to note that no explicit agreement by the participants need be proven before liability may be imposed. It would be enough to demonstrate an awareness of the Arab boycott and knowledge that concerted action was contemplated to give rise to an inference of agreement.[15]

The motive or lack of ill-will behind the boycott has been held to be of no moment. For example, group boycotts have been held to be illegal even when they grew out of private quarrels or when their purpose was not to affect competition.[16] A lack of malice toward the boycotted firms or persons, although sometimes considered by the courts, has not been sufficient to prevent a finding that a boycott is illegal; for to have that factor bar prosecution would be to undermine the policy of the Sherman Act to reach conspiracies which have significant economic impact.

Therefore, it would appear that a boycott restricting the free flow of domestic commerce, although based on factors that are primarily political or prompted by cultural prejudices, would be the kind of conduct intended to be covered by the Act.

FEDERAL TRADE COMMISSION ACT

The Federal Trade Commission Act mandates that the Federal Trade Commission "prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce."[17] Any

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[13] *See U.S.* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S. 347 (1963); *Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941).

[14] *See, e.g., American Medical Assn.* v. *United States*, 317 U.S. 519 (1943); and *Radovich* v. *National Football League*, 352 U.S. 445 (1957).

[15] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939).

[16] *See U.S.* v. *Hilton Hotels Corp.*, 467 F. 2d 1000 (9th Cir. 1972), *cert. denied*, 407 U.S. 11125 (1973).

[17] 15 U.S.C. 45, Section 5(a)(6).

unfair method of competition which violates the antitrust laws also constitutes a violation of Section 5 of the Act.[18] In *The Cement Institute* case the Court specifically rejected the contention that the Commission lacked jurisdiction because the alleged illegal practice also was cognizable under the Sherman Act.[19] Thus, the offenses found actionable under the Sherman Antitrust Act can also be found actionable under the Federal Trade Commission Act.

INTERNATIONAL IMPLICATIONS

The Federal restraint of trade laws have been held to extend to unfair practices taking place in foreign countries if they "radiate unlawful consequences here [in the United States]." [20]

The Sherman Act has received broad extraterritorial application and has been held to apply to agreements by American companies to cooperate with unreasonable restraints formed with persons in a foreign country, as long as domestic commerce is affected.[21] American courts have exercised subject matter jurisdiction over an agreement by an American company to cooperate with a boycott formed with persons in a foreign country since action by the American company was alleged to impede domestic commerce.

It would appear that a defense based upon the "foreign compulsion" doctrine could be raised. That is, an American company could claim that its actions were compelled by a foreign nation and therefore are immune from Sherman Act prohibitions.[22] However, there are serious doubts as to the effectiveness of this defense in the types of practices in issue here.

Unlike the cases where this defense has been successfully asserted, the alleged activity here has occurred on American soil, rather than in a foreign country under the jurisdiction of a foreign sovereign. American courts might well follow the policy set forth in *First National City Bank of New York* v. *Internal Revenue Service*.[23]

In that case, the court rejected the bank's assertion that it could not comply with an order of a United States court without violating Panamanian law and said: If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and of Panama perhaps it should surrender to one sovereign or the other the privileges received therefrom.

The obvious application of the *City Bank* principle to the Arab boycott practices would be that American firms—faced with a conflict between the laws of the United States and those of Arab Nations—either give up the protection provided by United States laws or submit to the requirements of those laws, namely the Sherman and FTC Acts.

Accordingly, an agreement by an American company to comply with the Arab boycott of Israel (by agreements to refrain from doing business in Israel, or with other American firms who do business in

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[18] *F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).
[19] *Id.* at 690, 691, 694.
[20] *Branch* v. *Federal Trade Commission*, 141 F.2d 31 (7th Cir. 1944).
[21] *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).
[22] *Interamerican Refining Corporation* v. *Texaco Maracaibo, Inc.*, 307 F. Supp. 1291 (D. Del. 1970).
[23] 271 F. 2d 616 (2d Cir. 1959), *cert. denied*, 316 U.S. 948 (1960).

Israel, or persons who have expressed support for Israel or who are Jewish as a condition for doing business with Arab firms would serve to bring the agreement of the American company within the reach of United States courts. The "foreign compulsion" doctrine would neither bar an action under Federal restraint of trade laws nor would it appear to be an effective defense to such an action.

CONCLUSION

The various boycott practices analyzed herein are actionable within the terms of the Sherman Antitrust Act (section 1) and of the Federal Trade Commission Act (section 5(a)(6)) insofar as they restrict the free flow of trade and competition within domestic commerce.

APPENDIX T

CONSEQUENCES OF THE SECRETARY OF COMMERCE'S REFUSAL TO DISCLOSE INFORMATION TO CONGRESS PURSUANT TO 50 U.S.C. APP. 2506(C)

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., November 5, 1975.

To: Honorable John Moss, Chairman, House Oversight and Investigations Subcommittee.
From: American Law Division.
Subject: Consequences of Secretary of Commerce's Refusal to Disclose Information to Congress Pursuant to 50 U.S.C. App. 2506(c).

Under separate cover of this date we are transmitting a compilation of statutory provisions which are similar to section 7(c) of the Export Administration Act of 1969, 50 U.S.C. 2406(c). You have also requested that we assess the impact, if any, on the oversight functions of the Congress if an interpretation similar to that adopted by the Secretary of Commerce is utilized by other agencies covered by the statutes.

Since the statutes compiled are similar to section 7(c) in that they restrict or prohibit disclosure of information obtained by an agency and do not explicitly exempt Congress from non-disclosure, they are susceptable to the construction espoused by the Secretary and the Attorney General that where Congress fails to exempt itself from a confidentiality provision it meant to deny itself access to such information.

The impact of such a construction would be severe and widespread. The 96 statutory provisions cover eleven cabinet departments and at least 14 other agencies, and involve a wide spectrum of information in such areas as agricultural statistics, alien and naturalization law, trade regulation, securities regulation, labor relations, communication regulations and the regulation of transportation, among others. Thus there would be a substantial diminuation of the quantum of information available to Congress and therefore a major curtailment of Congress' ability to perform its constitutional oversight function which of course would directly affect its lawmaking responsibilities.

As we indicated in our memorandum to you of September 19, 1975, such a consequence can nowhere be shown to have been intended ex-

plicitly by the Congress either with regard to section 7(c) or to the statutes included in the compilation either singly or as a group. Nor can such a divestiture of constitutional authority validly be effected by implication. See, e.g., *F.A.A. Administrator* v. *Robertson*, —— U.S. ——, 45 L. Ed. 2d 164, 173 (1975); *Rochester Ry Co.* v. *City of Rochester*, 251 U.S. 236, 248 (1907); *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287, 293 (1891); *Brown* v. *Duchesne*, 19 How. 183, 1975 (1875); *In re Chapman*, 166 U.S. 661, 671–672 (1897); *Jurney* v. *Machracken*, 294 U.S. 125 (1935); *Seymour* v. *U.S.*, 77 F. 2d 577, 579 (8th Cir. 1935).

MORTON ROSENBERG, *Legislative Attorney.*

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THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., November 5, 1975.

To: Honorable John Moss, Chairman, House Oversight and Investigation Subcommittee.
From: American Law Division.
Subject: Compilation of Confidentiality Provisions Similiar to Section 7(c) of the Export Administration Act of 1969.

Following is our report regarding the findings of our search for certain confidentiality statutes.

Your request specified that we determine the number of statutes currently in force which are similar to section 7(c) of the Export Administration Act of 1969, 50 U.S.C. App. 2406(c). By similar you specified you meant statutes which (1) prohibit disclosure of information in the possession of a government official, and (2) include no reference to the right of access of the Congress.

With the aid of the Library's computer we instituted a search of the United States Code for provisions with the above specified characteristics. The search resulted in a computer printout, 181 pages in length and containing 675 items. We have reviewed the printout, as well as other sources, and find that close to 100 provisions of law appear to meet your specifications.

We would note, however, that we have omitted inclusion of any provision which makes reference to 18 U.S.C. 1905, which generally proscribes the disclosure of confidential information by a Federal officer or employee. In the past this provision has been raised by executive agencies as a bar to compliance with congressional requests for information. However, this prohibition against disclosure may not be invoked against a request of a standing committee of Congress or one of its subcommittees since it is inapplicable where disclosure is "authorized by law." See, e.g., *Consumers Union* v. *Cost of Living Council*, 491 F. 2d 1396, 1403–1404 (T.E.C.A. 1974); *Grumman Aircraft Engineering Corp.* v. *Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970); *Frankel* v. *S.E.C.*, 376 F. Supp. 675 (S.D.N.Y. 1971), re'vd on other grounds, 460 F.2d 813 (2d Cir.), cert. denied 409 U.S. 889 (1972); *California* v. *Richardson*, 351 F. Supp. 733 (N.D. Calif. 1972); *M. A. Shapiro and Co.* v. *S.E.C.*, 339 F. Supp. 469 (D.D.C. 1972); *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969); 41 Op. Atty. Gen. 166 (1953); 41 Op. Atty. Gen.

221 (1955); 31 Op. Atty. Gen. 541 (1919). Such authorization is provided by 2 U.S.C. 190b, d (Suppl. 111, 1973).

We have omitted such provisions, however, not because of our belief that they cannot be utilized against disclosure for as we have noted they have been so used in the past, but because they literally are not "similar" to section 7(c) since that section makes no reference to section 1905. If such provisions were to be included in this compilation, our cursory examination of that type of provisions indicates at least 50 would be added to the list. This would then increase the total number of provisions similar to section 7(c) to in excess of 100.

For your convenience, we have first listed the statutory citations, with a short description of the information covered, and then follow that listing with copies of the statutory provisions themselves.

STATUTORY CITATIONS

1. 7 U.S.C. 13(e) (commodity futures).
2. 7 U.S.C. 135(a)(c)(4) (economic poisons).
3. 7 U.S.C. 135b(c) (economic poisons).
4. 7 U.S.C. 135f(C) (economic poisons).
5. 7 U.S.C. 136e(d) (pesticide production).
6. 7 U.S.C. 136j(a)(2)(D) (pesticide production).
7. 7 U.S.C. 472 (cotton statistics and estimates).
8. 7 U.S.C 507 (tobacco statistics).
9. 7 U.S.C. 608d(2) (regulation of agricultural marketing agreements).
10. 7 U.S.C. 610(i) (regulation of agricultural commodities).
11. 7 U.S.C. 612c-3 (agricultural products export reports).
12. 7 U.S.C. 955 (peanut statistics).
13. 7 U.S.C. 1159 (sugar surveys and investigations).
14. 7 U.S.C. 1373(c) (agricultural marketing quotas).
15. 7 U.S.C. 2105(c) (cotton research and promotion).
16. 7 U.S.C 2426 (plant variety protection).
17. 7 U.S.C. 2619(c) (potato research and promotion).
18. 7 U.S.C. 2623 (potato research and promotion).
19. 7 U.S.C. 2706 (egg research and production).
20. 8 U.S.C. 1202(f) (issuance and denial of visas & entry permits).
21. 8 U.S.C. 1304(b) (registration of aliens).
22. 10 U.S.C. 8795 (separation from Air Force).
23. 10 U.S.C. 7303b (hull design experiments).
24. 12 U.S.C. 77 (order removing director or officer of bank).
25. 12 U.S.C. 1701z-2(g) (housing information or data).
26. 12 U.S.C. 1828(f) (publication of non-compliance recommendations to banks).
27. 13 U.S.C. 9 (census data).
28. 13 U.S.C. 214 (census data).
29. 13 U.S.C. 302 (publication of foreign commerce & trade statistics).
30. 14 U.S.C. 325 (separation from Coast Guard).
31. 15 U.S.C. 50 (revealing FTC information).
32. 15 U.S.C. 77uuu(b) (revealing S.E.C. information).
33. 15 U.S.C. 78b note (foreign investment in U.S.).
34. 15 U.S.C. 78x(c) (use of S.E.C. information).
35. 15 U.S.C. 79v(c) (revealing information under P.U.H.C. Act).
36. 15 U.S.C. 80a-44 (revealing information under Investment Co. Act).
37. 15 U.S.C. 80b-10(a) (revealing information under Investment Advisors Act).
38. 15 U.S.C. 176a (foreign commerce).
39. 15 U.S.C. 190 (consular and commercial reports).
40. 15 U.S.C. 717g(b) (natural gas regulation).
41. 15 U.S.C. 1410(f) (motor vehicle safety).
42. 15 U.S.C. 1945(f) (motor vehicle insurance).
43. 16 U.S.C. 825(b) (revealing F.P.C. information).
44. 18 U.S.C. 1902 (disclosure of crop information).
45. 18 U.S.C. 1905 (disclosure of confidential information).
46. 18 U.S.C. 3578 (disclosure of conviction records).
47. 21 U.S.C. 331(j) (revealing food and drug information).
48. 21 U.S.C. 346a(f) (pesticide chemicals).

STATUTORY CITATIONS—Continued

49. 21 U.S.C. 1037(e) (egg products inspection).
50. 21 U.S.C. 1175 (drug patient records).
51. 22 U.S.C. 1436 (national security information).
52. 28 U.S.C. 1867(f) (jury selection records).
53. 29 U.S.C. 181(a) (collective bargaining information).
54. 30 U.S.C. 666 (coal research).
55. 30 U.S.C. 951(c) (coal mine safety research).
56. 35 U.S.C. 122 (patent applications).
57. 35 U.S.C. 181 (patent information).
58. 35 U.S.C. 186 (patent information).
59. 38 U.S.C. 653(b) (VA patient records).
60. 38 U.S.C. 3301 (VA records).
61. 39 U.S.C. 410 (postal information).
62. 42 U.S.C. 247c(5) (venereal disease records).
63. 42 U.S.C. 260(d) (drug treatment records).
64. 42 U.S.C. 653 (Parent Locater Service records).
65. 42 U.S.C. 1306 (social security records).
66. 42 U.S.C. 1320c-15 (patient records).
67. 42 U.S.C. 1395bb(a)(2) (accreditation reports).
68. 42 U.S.C. 2000e-5(b) (EEOC information).
69. 42 U.S.C. 2000e-8(e) (EEOC information).
70. 42 U.S.C. 2000g-2(b) (labor mediation records).
71. 42 U.S.C. 2162 (atomic energy information).
72. 42 U.S.C. 2181(e) (atomic energy information).
73. 42 U.S.C. 2231 (atomic energy information).
74. 42 U.S.C. 3610(a) (housing discrimination).
75. 42 U.S.C. 5658 (juvenile records).
76. 42 U.S.C. 5732 (juvenile records).
77. 45 U.S.C. 362(d) (Railroad Retirement Board information).
78. 46 U.S.C. 234 (Coast Guard information).
79. 46 U.S.C. 643(f) (Coast Guard discharge books).
80. 46 U.S.C. 1464(d) (boat safety).
81. 47 U.S.C. 154(j) (FCC information).
82. 47 U.S.C. 220(f) (FCC information).
83. 47 U.S.C. 412 (FCC information).
84. 49 U.S.C. 20 par. 7(f) (ICC information).
85. 49 U.S.C. 320(a) (ICC records).
86. 49 U.S.C. 322(d) (ICC records).
87. 49 U.S.C. 913(b) (ICC records).
88. 49 U.S.C. 917(e) (ICC records).
89. 49 U.S.C. 1021(e) (ICC records).
90. 50 U.S.C. App 327 (selective service records).
91. 50 U.S.C. App 643a (defense production records).
92. 50 U.S.C. App 1152(4) (defense contracts).
93. 50 U.S.C. App 2155(e) (defense production controls)
94. 50 U.S.C. App 2160(f) (commodity speculation).
95. 50 U.S.C. App 2403 (c) (export information).
96. Public Law 93-199, sec. 5 (foreign assistance studies).

MORTON ROSENBERG,
Legislative Attorney.

STATUTORY PROVISIONS

7 U.S.C.

[7 U.S.C. 13(e) (commodity futures)]

SEC. 401. Section 9 of the Commodity Exchange Act, as amended (7 U.S.C. 13), is amended by adding the following new subsections: "(d) It shall be a felony punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any Commissioner of the Commis-

sion or any employee or agent thereof, to participate, directly or indirectly, in any transaction in commodity futures or any transaction of the character of or which is commonly known to the trade as an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty', or for any such person to participate, directly or indirectly, in any investment transaction in an actual commodity: *Provided*, That such prohibition against any investment transaction in an actual commodity shall not apply to a transaction in which such person buys an agricultural commodity or livestock for use in his own farming or ranching operations or sells an agricultural commodity which he has produced in connection with his own farming or ranching operations nor to any transaction in which he sells livestock which he has owned at least three months. With respect to such excepted transactions, the Commission shall require any Commissioner of the Commission or any employee or agent thereof who participates in any transaction to notify the Commission thereof in accordance with such regulations as the Commission shall prescribe and the Commission shall make such information available to the public.

"(e) It shall be a felony punishable by a fine of not more than $10,000 or imprisonment for not more than five years, or both, together with the costs of prosecution—(1) for any Commissioner of the Commission or any employee or agent thereof who, by virtue of his employment or position, acquires information which may affect or tend to affect the price of any commodity futures or commodity and which information has not been made public to impart such information with intent to assist another person, directly or indirectly, to participate in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an 'option', 'priilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty'; and (2) for any person to acquire such information from any Commissioner of the Commission or any employee or agent thereof and to use such information in any transaction in commodity futures, any transaction in an actual commodity, or in any transaction of the character of or which is commonly known to the trade as an 'option', 'privilege', 'indemnity', 'bid', 'offer', 'put', 'call', 'advance guaranty', or 'decline guaranty'."

* * * * * * *

[7 U.S.C. 135(a)(c)(4) (economic poisons)]

§ 135a. Prohibited acts

(c) It shall be unlawful

* * * * * * *

(4) for any person to use for his own advantage or to reveal, other than to the Administrator, or officials or employees of the Environmental Protection Agency, or other Federal agencies, or to the courts in response to a subpena, or to physicians, and in emergencies to pharmacists and other qualified persons, for use in the preparation of antidotes, in accordance with such directions as the Administrator may prescribe, any information relative to formulas of products acquired by authority of section 135b of this title.

[7 U.S.C. 135b(c) (economic poisons)]

§ 135b. Registration of economic poisons—General requirements; single economic poisons; supplement statements; filing and contents of statements

Notification of noncompliance with requirements; corrections; refusal, suspension or cancellation of registration by Administrator; effective date of cancellation; advisory committees and procedures; objections; public hearings; Administrator's orders; consultation with other agencies; confidential information; public hazard suspension; orders reviewable; defense of registration

(c) In connection with consideration of any registration or application for registration under this section, the Administrator may consult with any other Federal agency or with an advisory committee appointed as herein provided. Notwithstanding the provisions of section 135a(c)(4) of this title, information relative to formulas of products acquired by authority of this section may be revealed, when necessary under this section, to an advisory committee, or to any Federal agency consulted, or at a public hearing, or in findings of fact issued by the Administrator. All data submitted to an advisory committee in support of a petition under this section shall be considered confidential by such advisory committee: *Provided*, That this provision shall not be construed as prohibiting the use of such data by the committee in connection with its consultation with the petitioner or representatives of the Environmental Protection Agency, as provided for herein, and in connection with its report and recommendations to the Administrator.

[7 U.S.C. 135f(C) (economic poisons)]

§ 135f. Penalties

* * * * * * *

(c) Notwithstanding any other provision of this section, in case any person, with intent to defraud, uses or reveals information relative to formulas of products acquired under the authorityy of section 135b of this title, he shall be fined not more than $10,000 or imprisoned for not more than three years, or both such fine and imprisonment.

[7 U.S.C. 136e(d) (pesticide production)]

§ 136e. Registration of establishments

(a) Requirement.—No person shall produce any pesticide subject to this subchapter in any State unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the name and address of the estabilshment and of the producer who operates such establishment.

(b) Registration.—Whenever the Administrator receives an application under subsection (a) of this section, he shall register the establishment and assign it an establishment number.

(c) Information required.—

(1) Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides—

(A) which he is currently producing;
(B) which he has produced during the past year; and
(C) which he has sold or distributed during the past year.

The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe.

(2) Any such producer shall, upon the request of the Administrator for the purpose of issuing a stop sale order pursuant to section 136k of this title, inform him of the name and address of any recipient of any pesticide produced in any registered establishment which he operates.

(d) Confidential records and information.—Any information submitted to the Administrator pursuant to subsection (c) of this section shall be considered confidential and shall be subject to the provisions of section 136h of this title.

[7 U.S.C. 136j(a)(2)(D8 (pesticide production)]

§ 136j. Unlawful acts

(a) In general.—

(2) It shall be unlawful for any person—

(D) to use for his own advantage or to reveal, other than to the Administrator, or officials or employees of the Environmental Protection Agency or other Federal executive agencies, or to the courts, or to physicians, pharmacists, and other qualified persons, needing such information for the performance of their duties, in accordance with such directions as the Administrator may prescribe, any information acquired by authority of this subchapter which is confidential under this subchapter;

[7 U.S.C. 472 (cotton statistics and estimates)]

§ 472. Information furnished of confidential character; penalty for divulging information

The information furnished by any individual establishment under the provisions of this chapter shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Department of Agriculture who, without the written authority of the Secretary of Agriculture, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this chapter shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than $300 or more than $1,000, or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court.

[7 U.S.C. 507 (tobacco statistics)]

§ 507. Limitation on use of statistical information

The information furnished under the provisions of this chapter shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Secretary of Agriculture whereby the data furnished by any particular establishment can be identified, nor shall the Secretary of Agriculture permit anyone other

than the sworn employees of the Department of Agriculture to examine the individual reports.

[7 U.S.C. 608d(2) (regulation of agricultural marketing agreements)]

§ 608d. Books and records; disclosure of information

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(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

[7 U.S.C. 610(i) (regulation of agricultural commodities)]

§ 610. Administration—Appointment of officers and employees; impounding appropriations

Cooperation with State authorities; imparting information

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d(1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the in-

formation so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title.

[7 U.S.C. 612c-3 (agricultural products export reports)]

§ 612c-3. Export sales reports; reporting period; contents; confidentiality; compilation and publication by Secretary; penalty for failure to report; monthly reports

All exporters of wheat and wheat flour, feed grains, oil seeds, cotton and products thereof, and other commodities the Secretary may designate produced in the United States shall report to the Secretary of Agriculture, on a weekly basis, the following information regarding any contract for export sales entered into or subsequently modified in any manner during the reporting period: (a) type, class, and quantity of the commodity sought to be exported, (b) the marketing year of shipment, (c) destination, if known. Individual reports shall remain confidential but shall be compiled by the Secretary and published in compilation form each week following the week of reporting. All exporters of agricultural commodities produced in the United States shall upon request of the Secretary of Agriculture immediately report to the Secretary any information with respect to support sales of agricultural commodities and at such times as he may request. Any person (or corporation) who knowingly fails to report export sales pursuant to the requirements of this section shall be fined not more than $25,000 or imprisoned not more than one year, or both. The Secretary may, with respect to any commodity or type or class thereof during any period in which he determines that there is a domestic supply of such commodity substantially in excess of the quantity needed to meet domestic requirements, and that total supplies of such commodity in the exporting countries are estimated to be in surplus, and that anticipated exports will not result in excessive drain on domestic supplies, and that to require the reports to be made will unduly hamper export sales, provide for such reports by exporters and publishing of such data to be a monthly basis rather than on a weekly basis.

[7 U.S.C. 955 (peanut statistics)]

§ 955. Limitation on use of statistical information

The information furnished under the provisions of this chapter shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Secretary whereby the data furnished by any person can be identified, nor shall the Secretary permit anyone other than the sworn employees of the Department of Agriculture to examine the individual reports.

[7 U.S.C. 1159 (sugar surveys and investigations]

§ 1159. Surveys and investigations by Secretary; producer-processor and producer-labor contracts

Whenever the Secretary determines that such action is necessary to effectuate the purposes of this chapter, he is authorized, if first requested by persons constituting or representing a substantial proportion of the persons affected in any one of the five domestic sugar-producing areas, to make for such area surveys and investigations to the extent he deems necessary, including the holding of public hear-

ings, and to make recommendations with respect to (a) the terms and conditions of contracts between the producers and processors of sugar beets and sugarcane in such area and (b) the terms and conditions of contracts between laborers and producers of sugar beets and sugarcane in such area. In carrying out the provisions of this section, information shall not be made public with respect to the individual operations of any processor, producer, or laborer.

[7 U.S.C. 1373(c) (agricultural marketing quotas)]

§ 1373. Reports and records—Persons reporting

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Data as confidential

(c) All data reported to or acquired by the Secretary pursuant to this section shall be kept confidential by all officers and employees of the Department, and only such data so reported or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing under this subchapter.

[7 U.S.C. 2105(c) (cotton research and promotion)]

§ 2105. Permissive terms and conditions in orders

Orders issued pursuant to this chapter shall contain one or more of the following terms and conditions, and except as provided in section 2106 of this title, no others.

* * * * * * *

(c) Providing that handlers or any class of handlers maintain and make available for inspection such books and records as may be required by the order and for the filing of reports by such handlers at the times, in the manner, and having the content prescribed by the order, to the end that information and data shall be made available to the Cotton Board and to the Secretary which is appropriate or necessary to the effectuation, administration, or enforcement of this chapter or of any order or regulation issued pursuant to this chapter: *Provided, however*, That all information so obtained shall be kept confidential by all officers and employees of the Department of Agriculture and of the Cotton Board, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (1) the issuance of general statements based upon the reports of a number of handlers subject to an order, which statements do not identify the information furnished by any person, or (2) the publication by direction of the Secretary, of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. Any such officer or employee violating the provisions of this subsection shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

[7 U.S.C. 2426 (plant variety protection)]

§ 2426. Confidential status of application

Applications for plant variety protection and their contents shall be kept in confidence by the Plant Variety Protection Office, by the Board, and by the offices in the Department of Agriculture to which access may be given under regulations. No information concerning the same shall be given without the authority of the owner, unless necessary under special circumstances as may be determined by the Secretary, except that the Secretary may publish the variety names designated in applications, stating the kind to which each applies.

[7 U.S.C. 2619(c) (potato research and promotion)]

§ 2619. Assessments—Collection and payment; recordkeeping; limitation

Confidential information; disclosure during proceedings; prohibition inapplicable to general statements and publications of violations; penalties; removal from office

(c) All information obtained pursuant to subsections (a) and (b) of this section shall be kept confidential by all officers and employees of the Department of Agriculture and of the board, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which he or any officer of the United States is a party, and involving the plan with reference to which the information to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit—

(1) the issuance of general statements based upon the reports of a number of handlers subject to a plan if such statements do not identify the information furnished by any person, or

(2) the publication by direction to the Secretary of the name of any person violating any plan together with a statement of the particular provisions of the plan violated by such person.

Any such officer or employee violating the provisions of this subsection shall upon conviction be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both, and shall be removed from office.

[7 U.S.C. 2623 (potato research and production)]

§ 2623. Issuance of plans; referendum; penalties for disclosure of confidential information or reports

The Secretary shall conduct a referendum among producers who, during a representative period determined by the Secretary, have been engaged in the production of potatoes for the purpose of ascertaining whether the issuance of a plan is approved or favored by producers. No plan issued pursuant to this chapter shall be effective unless the Secretary determines that the issuance of such plan is approved or favored by not less than two-thirds of the producers voting in such referendum, or by the producers of not less than two-thirds of the potatoes produced during the representative period by producers vot-

ing in such referendum, and by not less than a majority of the producers voting in such referendum. The ballots and other information or reports which reveal or tend to reveal the vote of any producer or his production of potatoes shall be held strictly confidential and shall not be disclosed. Any officer or employee of the Department of Agriculture violating the provisions hereof shall upon conviction be subject to the penalties provided in section 2619(c) of this title.

[7 U.S.C. 2706 (egg research and production)]

PERMISSIVE TERMS IN ORDERS

SEC. 7. Orders issued pursuant to this Act shall contain one or more of the following terms and conditions, and except as provided in section 8, no others.

* * * * * * *

(c) Providing that hatchery operators, persons engaged in the sale of egg-type baby chicks and started pullet dealers, persons engaged in the production of commercial eggs and persons who receive or otherwise acquire eggs from such persons and who process, prepare for market, or market such eggs, including eggs of their own production, and persons engaged in the purchase, sale, or processing of spent fowl, maintain and make available for the inspection such books and records as may be required by any order issued pursuant to this Act and for the filing of reports by such persons at the time, in the manner, and having content prescribed by the order, to the end that information and data shall be made available to the Egg Board and to the Secretary which is appropriate or necessary to the effectuation, administration or enforcement of the Act, or of any order or regulation issued pursuant to this Act: *Provided, however*, That all information so obtained shall be kept confidential by all officers and employees of the Department of Agriculture, the Egg Board, and by all officers and employees of contracting agencies having access to such information, and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary, or to which he or any officer of the United States is a party, and involving the order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (1) the issuance of general statements based upon the reports of the number of persons subject to an order or statistical data collected therefrom, which statements do not identify the information furnished by any person, (2) the publication, by direction of the Secretary, of general statements relating to refunds made by the Egg Board during any specific period, or (3) the publication by direction of the Secretary of the name of any person violating any order, together with a statement of the particular provisions of the order violated by such person. Any such officer or employee violating the provision of this subsection shall, upon conviction, be subjected to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and if an officer or employee of the Egg Board or Department of Agriculture shall be removed from office.

[8 U.S.C. 1202(f) (issuance and denial of visas & entry permits)]

§ 1202. Application for visas—Immigrant visas

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Confidential nature of records

(f) The records of the Department of State and of diplomatic and consular offices of the United States pertaining to the issuance or refusal of visas or permits to enter the United States shall be considered confidential and shall be used only for the formulation, amendment, administration, or enforcement of the immigration, nationality, and other laws of the United States, except that in the discretion of the Secretary of State certified copies of such records may be made available to a court which certifies that the information contained in such records is needed by the court in the interest of the ends of justice in a case pending before the court.

[8 U.S.C. 1304(b) (registration of aliens)]

§ 1304. Forms for registration and fingerprinting—Preparation; contents

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Confidential nature

(b) All registration and fingerprint records made under the provisions of this subchapter shall be confidential, and shall be made available only to such persons or agencies as may be designated by the Attorney General.

[10 U.S.C. 8795 (separation from Air Force)]

§ 8795. Rights and procedures

Each officer under consideration for removal from the active list of the Regular Air Force under this chapter shall be—

(1) notified in writing of the charges against him, at least 30 days before the hearing of his case by a board of inquiry, for which he is being required to show cause for retention on the active list;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary of the Air Force, to prepare his defense.

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to his case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the the interests of national security.

In any case where any records are withheld under clause (4), the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

[10 U.S.C. 7303b (hull design experiments)]

§ 7303. Model Basin; investigation of hull designs

(a) The Bureau of Ships shall conduct at the David W. Taylor Model Basin, Carderock, Maryland, investigations to determine the most suitable shapes and forms for United States vessels and aircraft and investigations of other problems of their design.

(b) The Secretary of the Navy may authorize experiments to be made at the Model Basin for private persons. The costs of experiments made for private persons shall be paid by those persons under regulations prescribed by the Secretary. The results of private experiments are confidential and may not be divulged without the consent of the persons for whom they are made. However, the data obtained from such experiments may be used by the Secretary for governmental purposes, subject to the patent laws of the United States.

12 U.S.C.

[12 U.S.C. 77 (order removing director or officer of bank)]

§ 77. Removal of director or officer

Whenever, in the opinion of the Comptroller of the Currency, any director or officer of a national bank, or of a bank or trust company doing businesss in the District of Columbia, or whenever, in the opinion of a Federal reserve agent, any director or officer of a State member bank in his district shall have continued to violate any law relating to such bank or trust company or shall have continued unsafe or unsound practices in conducting the business of such bank or trust company, after having been warned by the Comptroller of the Currency or the Federal reserve agent, as the case may be, to discontinue such violations of law or such unsafe or unsound practices, the Comptroller of the Currency or the Federal reserve agent, as the case may be, may certify the facts to the Board of Governors of the Federal Reserve System. In any such case the Board may cause notice to be served upon such director or officer to appear before such Board to show cause why he should not be removed from office. A copy of such order shall be sent to each director of the bank affected, by registered mail. If after granting the accused director or officer a reasonable opportunity to be heard, the Board of Governors of the Federal Reserve System finds that he has continued to violate any law relating to such bank or trust company or has continued unsafe or unsound practices in conducting the business of such bank or trust company after having been warned by the Comptroller of the Currency or the Federal reserve agent to discontinue such violation of law or such unsafe or unsound practices, the Board of Governors of the Federal Reserve System, in its discretion, may order that such director or officer be removed from office. A copy of such order shall be served upon such director or officer. A copy of such order shall also be served upon the bank of which he is a director or officer, whereupon such director or officer shall cease to be a director or officer of such bank: *Provided*, That such order and findings of fact upon which it is based shall not be made public or disclosed to anyone except the director or officer involved and the directors of the bank involved, otherwise than in connection with proceedings for a violation of this section. Any such director or officer removed from office as

herein provided who thereafter participates in any manner in the management of such bank shall be fined not more than $5,000, or imprisoned for not more than five years, or both, in the discretion of the court.

[12 U.S.C. 1701z-2(g) (housing information or data)]

§ 1701z-2. Advanced technologies, methods, and materials for housing construction, rehabilitation, and maintenance—General acceptance; costs, reduction; health and safety restrictions on expanded housing production

* * * * * * *

Information and data; restriction on use of identification

(g) The Secretary is authorized to request and receive such information or data as he deems appropriate from private individuals and organizations, and from public agencies. Any such information or data shall be used only for the purposes for which it is supplied, and no publication shall be made by the Secretary whereby the information or data furnished by any particular person or establishment can be identified, except with the consent of such person or establishment. Pub. L. 91-609, Title V, § 502, Dec. 31, 1970, 84 Stat. 1784.

[12 U.S.C. 1828(f) (publication of non-compliance recommendations to banks)]

§ 1828. Regulations governing insured banks—Display of signs

* * * * * * *

Publication of reports

(f) Whenever any insured bank (except a national bank or a District bank), after written notice of the recommendations of the Corporation based on a report of examination of such bank by an examiner of the Corporation, shall fail to comply with such recommendations within one hundred and twenty days after such notice, the Corporation shall have the power, and is authorized, to publish only such part of such report of examination as relates to any recommendation not complied with: *Provided*, That notice of intention to make such publication shall be given to the bank at least ninety days before such publication is made.

13 U.S.C.

[13 U.S.C. 9 (census data)]

§ 9. Information as confidential; exception

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which is is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.

[13 U.S.C. 214 (census data)]

§ 214. Wrongful disclosure of information

Whoever, being an employee referred to in subchapter II of chapter 1 of this title, having taken and subscribed the oath of office, publishes or communicates, without the written authority of the Secretary or other authorized officer or employee of the Department of Commerce or bureau or agency thereof, any information coming into his possession by reason of his employment under the provisions of this title, shall be fined not more than $1,000 or imprisoned not more than two years, or both. Aug. 31, 1954, c. 1158, § 1, 63 Stat. 1023.

[13 U.S.C. 302 (publication of foreign commerce & trade statistics)]

§ 302. Rules, regulations, and orders

The Secretary may make such rules, regulations, and orders as he deems necessary or appropriate to carry out the provisions of this chapter. Any rules, regulations, or orders issued pursuant to this authority may be established in such form or manner, may contain such classifications or differentiations, and may provide for such adjustments and reasonable exceptions as in the judgment of the Secretary are necessary or proper to effectuate the purpose of this chapter, or to prevent circumvention or evasion of any rule, regulation, or order issued hereunder. The Secretary may also provide by rule or regulation, for such confidentiality, publication, or disclosure, of information collected hereunder as he may deem necessary or appropriate in the public interest. Rules, regulations, and orders, or amendments thereto shall have the concurrence of the Secretary of the Treasury prior to promulgation.

14 U.S.C.

[14 U.S.C. 325 (separation from Coast Guard)]

§ 325. Rights and procedures

Each officer under consideration for removal under section 322 of this title shall be—

(1) notified in writing at least thirty days before the hearing of the case by a board of inquiry of the reasons for which the officer is being required to show cause for retention;

(2) allowed reasonable time, as determined by the board of inquiry under regulations of the Secretary, to prepare his defense;

(3) allowed to appear in person and by counsel at proceedings before a board of inquiry; and

(4) allowed full access to, and furnished copies of, records relevant to the case at all stages of the proceeding, except that a board shall withhold any records that the Secretary determines should be withheld in the interests of national security. In any case where

any records are withheld under this clause, the officer whose case is under consideration shall, to the extent that the national security permits, be furnished a summary of the records so withheld.

15 U.S.C.

[15 U.S.C. 50 (revealing FTC information)]

§ 50. Offenses and penalties

* * * * * * *

Any officer or employee of the Commission who shall make public any information obtained by the Commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

[15 U.S.C. 77uuu(b) (revealing S.E.C. information)]

§ 77uuu. Special powers of the Commission

* * * * * * *

(b) Notwithstanding any provision of this subchapter, no report, record, or other information made available to the Commission under this subsection, no report of an examination made under this subsection for the use of the Commission, no report of an examination made of any trustee or prospective trustee by any Federal, State, Territorial, or District authority having jurisdiction to examine or supervise such trustee, no report made by any such trustee or prospective trustee to any such authority, and no correspondence between any such authority and any such trustee or prospective trustee, shall be divulged or made known or available by the Commission or any member, officer, agent, or employee thereof, to any person other than a member, officer, agent, or employee of the Commission: *Provided*, That the Commission may make available to the Attorney General of the United States, in confidence, any information obtained from such records, reports of examination, other reports, or correspondence, and deemed necessary by the Commission, or requested by him, for the purpose of enabling him to perform his duties under this subchapter.

[15 U.S.C. 78b (foreign investment in U.S.)]

POWERS

SEC. 7. (a) The Secretary of Commerce and the Secretary of the Treasury may each by regulation establish whatever rules each deems necessary to carry out each of his functions under this Act.

(b) Each such Secretary may require any person subject to the jurisdiction of the United States—

(1) to maintain a complete record of any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which such Secretary determines is germane to his functions in the foreign direct investment and foreign portfolio investment studies to be conducted pursuant to this Act; and

(2) to furnish under oath any report containing whatever information such Secretary determines is necessary to carry out his

functions in such studies. Whenever an order under clause (2) of this subsection requires a person to produce information which can be specifically identified as being part of the records of its customers, the Secretary shall, upon being provided the names and addresses of such customers, send a notice to such customers that information from their records will be disclosed pursuant to this Act; *Provided*, That this requirement shall not apply when such person is directly involved in the ownership or management of assets for the customer as nominee, agent, partner, fiduciary, trustee, or in a similar relationship.

The authority of each Secretary under this subsection shall expire on the date provided under section 10 of this Act for the Secretary of Commerce and the Secretary of the Treasury to submit a full and complete report to the Congress.

(c) In addition to the Secretary of Commerce and the Secretary of the Treasury, the only individuals who may have access to information furnished under subsection (b)(2) are those sworn employees, including consultants, of the Department of Commerce or Department of the Treasury designated by the Secretary of either such Department. Neither such Secretary nor any such employee may—

(1) use any information furnished under subsection (b)(2) except for analytical or statistical purposes within the United States Government; or

(2) publish, or make available to any other person in any manner, any such information in a manner that the information furnished under subsection (b)(2) by any person can be specifically identified, except for the purposes of a proceeding under section 8.

Such Secretaries may exchange any such information furnished under subsection (b)(2) in order to prevent any duplication or omission in the studies conducted by each such Secretary pursuant to this Act.

(d) Except for the requirement under subsection (b)(2), no agency of the United States or employee thereof may compel (1) the Secretary of Commerce or the Secretary of the Treasury, (2) any individual designated by either such Secretary under the first sentence of subsection (c), or (3) any person which maintained or furnished any report under subsection (b), to submit any such report or constituent part thereof to that agency or any other agency of the United States. Without the prior written consent of the person which maintained or furnished any report under subsection (b) and without the prior written consent of the customer, where the person maintained or furnished any such report which included information identifiable as being derived from the records of such customer, such report or any such constituent part may not be produced for any judicial or administrative proceeding, except for a proceeding under section 8(b) of this Act.

[15 U.S.C. 78x(c) (use of S.E.C. information)]

§ 78x. Information filed with the Commission

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(c) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit, any information contained in any application, report, or document filed with

the Commission which is not made available to the public pursuant to subsection (b) of this section: *Provided*, That the Commission may make available to the Board of Governors of the Federal Reserve System any information requested by the Board for the purposes of enabling it to perform its duties under this chapter.

[15 U.S.C. 79v(c) (revealing information under P.U.H.C. Act)]

§ 79v. Access of public to information filed with Commission; unlawful disclosure or use of information

* * * * * * *

(c) It shall be unlawful for any member, officer, or employee of the Commission to disclose to any person other than a member, officer, or employee of the Commission, or to use for personal benefit any information contained in any application, declaration, report or document filed with the Commission which is not made available to the public pursuant to this section.

[15 U.S.C. 80a-44 (revealing information under Investment Co. Act)]

§ 80a-44. Disclosure of information filed with Commission; copies

(a) The information contained in any registration statement, application, report, or other document filed with the Commission pursuant to any provision of this subchapter or of any rule or regulation thereunder (as distinguished from any information or document transmitted to the Commission) shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. It shall be unlawful for any member, officer, or employee of the Commission to usefor personal benefit, or to disclose to any person other than an official or employee of the United States or of a State, for official use, or for any such official or employee to use for personal benefit, any information contained in any document so filed or transmitted, if such information is not available to the public.

(b) Photostatic or other copies of information contained in documents filed with the Commission under this subchapter and made available to the public shall be furnished any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

[15 U.S.C. 80b-10(a) (revealing information under Investment Advisors Act)]

§ 80b-10. Disclosure of information by Commission

(a) The information contained in any registration application or report or amendment thereto filed with the Commission pursuant to any provision of this subchapter shall be made available to the public, unless and except insofar as the Commission, by rules and regulations upon its own motion, or by order upon application, finds that public disclosure is neither necessary nor appropriate in the public interest or for the protection of investors. Photostatic or other copies of information contained in documents filed with the Commission

under this subchapter and made available to the public shall be furnished to any person at such reasonable charge and under such reasonable limitations as the Commission shall prescribe.

[15 U.S.C. 176a (foreign commerce)]

§ 176a. Confidential nature of information furnished Bureau

Any statistical information furnished in confidence to the Bureau of Foreign and Domestic Commerce by individuals, corporations, and firms shall be held to be confidential, and shall be used only for the statistical purposes for which it is supplied. The Director of the Bureau of Foreign and Domestic Commerce shall not permit anyone other than the sworn employees of the Bureau to examine such individual reports, nor shall he permit any statistics of domestic commerce to be published in such manner as to reveal the identity of the individual, corporation, or firm furnishing such data.

[15 U.S.C. 190 (consular and commercial reports)]

§ 190. Discussions in commercial reports of partisan questions

No part of the consular and other commercial reports of the Department of Commerce, including circular letters to chambers of commerce, discussing partisan political, religious, or moral questions shall be published.

[15 U.S.C. 717g(b) (natural gas regulation)]

§ 717g. Accounts; records; memoranda

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(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of natural-gas companies; and it shall be the duty of such natural-gas companies to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officers, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books, records, data, or accounts, except insofar as he may be directed by the Commission or by a court.

[15 U.S.C. 1410(f) (motor vehicle safety)]

§ 1410. Exemption from safety standards of motor vehicles—Eligibility; procedure; criteria for temporary exemption or renewal of exemption; publication of notice of decision in Federal Register

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Promulgation of regulations for applications; disclosure of information contained in application

(f) The Secretary shall promulgate regulations within 90 days (which time may be extended by the Secretary by a notice published

in the Federal Register stating good cause therefor) after October 25, 1972, for applications for exemption from any motor vehicle safety standard provided for in this section. The Secretary may make public within 10 days of the date of filing an application under this section all information contained in such application or other information relevant thereto unless such information concerns or relates to a trade secret, or other confidential business information, not relevant to the application for exemption.

[15 U.S.C. 1945(f) (motor vehicle insurance)]

§ 1945. Insurance reports and information—Duty of insurers of passenger motor vehicles

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Dissemination of information by Secretary

(f) The Secretary shall not, in disseminating any information received pursuant to this section, disclose the name of, or other identifying information about, any person who may be an insured, a claimant, a passenger, an owner, a driver, an injured person, a witness, or otherwise involved in any motor vehicle crash or collision unless the Secretary has the consent of the persons so named or otherwise identified.

16 U.S.C.

[16 U.S.C. 825(b) (revealing F.P.C. information)]

§ 825. Accounts, records and memoranda; duty to keep; examination by Commission; disclosure of information

* * * * * * *

(b) The Commission shall at all times have access to and the right to inspect and examine all accounts, records, and memoranda of licensees and public utilities, and it shall be the duty of such licensees and public utilities to furnish to the Commission, within such reasonable time as the Commission may order, any information with respect thereto which the Commission may by order require, including copies of maps, contracts, reports of engineers, and other data, records, and papers, and to grant to all agents of the Commission free access to its property and its accounts, records, and memoranda when requested so to do. No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

18 U.S.C.

[18 U.S.C. 1902 (disclosure of crop information)]

§ 1902. Disclosure of crop information and speculation thereon

Whoever, being an officer, employee or person acting for or on behalf of the United States or any department or agency thereof, and having by virtue of his office, employment or position, become possessed of information which might influence or affect the market value of any product of the soil grown within the United States, which information is by law or by the rules of such department or agency

required to be withheld from publication until a fixed time, willfully imparts, directly or indirectly, such information, or any part thereof, to any person not entitled under the law or the rules of the department or agency to receive the same; or, before such information is made public through regular official channels, directly or indirectly speculates in any such product by buying or selling the same in any quantity, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

No person shall be deemed guilty of a violation of any such rules, unless prior to such alleged violation he shall have had actual knowledge thereof.

[18 U.S.C. 1905 (disclosure of confidential information)]

§ 1905. Disclosure of confidential information generally

Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

[18 U.S.C. 3578 (disclosure of conviction records)]

§ 3578. Conviction records

(a) The Attorney General of the United States is authorized to establish in the Department of Justice a repository for records of convictions and determinations of the validity of such convictions.

(b) Upon the conviction thereafter of a defendant in a court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court shall cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe.

(c) Records maintained in the repository shall not be public records. Certified copies thereof—

(1) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(2) may be furnished for law enforcement purposes on request of a court or law enforcement or corrections officer of a State, any political subdivision, or any department, agency, or instrumentality thereof, if a statute of such State requires that, upon the conviction of a defendant in a court of the State or any political subdivision thereof for an offense punishable in such court by death or imprisonment in excess of one year, or a judicial determination of the validity of such conviction on collateral review, the court cause a certified record of the conviction or determination to be made to the repository in such form and containing such information as the Attorney General of the United States shall by regulation prescribe; and

(3) shall be prima facie evidence in any court of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof, that the convictions occurred and whether they have been judicially determined to be invalid on collateral review.

(d) The Attorney General of the United States shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations under this section.

21 U.S.C.

[21 U.S.C. 331(j) (revealing food and drug information)]

§ 331. Prohibited acts

* * * * * * *

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this chapter, any information acquired under authority of section 344, 348, 355, 356, 357, 360b, 374, or 376 of this title concerning any method of process which as a trade secret is entitled to protection.

[21 U.S.C. 346a (f) (pesticide chemicals)]

§ 346a. Tolerances for pesticide chemicals in or on raw agricultural commodities

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Data submitted as confidential

(f) All data submitted to the Administrator or to an advisory committee in support of a petition under this section shall be considered confidential by the Administrator and by such advisory committee until publication of a regulation under paragraph (2) or (3) of subsection (d) of this section. Until such publication, such data shall not be revealed to any person other than those authorized by the Administrator or by any advisory committee in the carrying out of their official duties under this section.

[21 U.S.C. 1037(e) (egg products inspection)]

§ 1037. Prohibited acts

* * * * * * *

(e) No person, while an official or employee of the United States Government or any State or local governmental agency, or thereafter, shall use to his own advantage, or reveal other than to the authorized representatives of the United States Government or any State or other government in their official capacity, or as ordered by a court in a judicial proceeding, any information acquired under the authority of this chapter concerning any matter which is entitled to protection as a trade secret.

[21 U.S.C. 1175 (drug patient records)]

§ 1175. Confidentiality of patient records—Disclosure authorization

(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Purposes and circumstances of disclosure affecting consenting patient and patient regardless of consent

(b)(1) The content of any record referred to in subsection (a) of this section may be disclosed in accordance with the prior written consent of the patient with respect to whom such record is maintained, but only to such extent, under such circumstances, and for such purposes as may be allowed under regulations prescribed pursuant to subsection (g) of this section.

(2) Whether or not the patient, with respect to whom any given record referred to in subsection (a) of this section is maintained, gives his written consent, the content of such record may be disclosed as follows:

(A) To medical personnel to the extent necessary to meet a bona fide medical emergency.

(B) To qualified per[illegible]l for the purpose of conducting scientific research, manage[illegible] audits, financial audits, or program evaluation, but such personnel may not identify, directly, or indirectly, any individual patient in any report of such research, audit, or evaluation, or otherwise disclose patient identities in any manner.

(C) If authorized by an appropriate order of a court of competent jurisdiction granted after application showing good cause therefor. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determin-

ing the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

Prohibition against use of record in making criminal charges or investigation of patient

(c) Except as authorized by a court order granted under subsection (b)(2)(C) of this section, no record referred to in subsection (a) of this section may be used to initiate or substantiate any criminal charges against a patient or to conduct any investigation of a patient.

Continuing prohibition against disclosure irrespective of status as patient

(d) The prohibitions of this section continue to apply to records concerning any individual who has been a patient, irrespective of whether or when he ceases to be a patient.

Armed Forces and Veterans' Administration; interchange of records

(e) The prohibitions of this section do not apply to any interchange of records—

(1) within the Armed Forces or within those components of the Veterans' Administration furnishing health care to veterans, or

(2) between such components and the Armed Forces.

Penalty for first and subsequent offenses

(f) Any person who violates any provision of this section or any regulation issued pursuant to this section shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of each subsequent offense.

Regulations; interagency consultations; definitions, safeguards, and procedures, including procedures and criteria for issuance and scope of orders

(g) The Director of the Special Action Office for Drug Abuse Prevention, after consultation with the Administrator of Veterans' Affairs and the heads of other Federal departments and agencies substantially affected thereby, shall prescribe regulations to carry out the purposes of this section. These regulations may contain such definitions, and may provide for such safeguards and procedures, including procedures and criteria for the issuance and scope of orders under subsection (b)(2)(C) of this section, as in the judgment of the Director are necessary or proper to effectuate the purposes of this section, to prevent circumvention or evasion thereof, or to facilitate compliance therewith.

Regulations of Administrator; applicable regulations for veterans; coordination with regulations of Secretary

(h) The Administrator of Veterans' Affairs, through the Chief Medical Director, shall, to the maximum feasible extent consistent with their responsibilities under Title 38, prescribe regulations making applicable the regulations established by the Secretary under subsection (g) of this section to records maintained in connection with the provision of hospital care, nursing home care, domiciliary care, and medical services under such Title 38 to veterans suffering from drug abuse. In prescribing and implementing regulations pursuant to this

subsection, the Administrator shall, from time to time, consult with the Secretary in order to achieve the maximum possible coordination of the regulations, and the implementation thereof, which they each prescribe.".

22 U.S.C.

[22 U.S.C. 1436 (national security information)]

§ 1436. Restriction on disclosure of information

Nothing in this chapter shall authorize the disclosure of any information or knowledge in any case in which such disclosure (1) is prohibited by any other law of the United States, or (2) is inconsistent with the security of the United States.

28 U.S.C.

[28 U.S.C. 1867(f) (jury selection records)]

§ 1867. Challenging compliance with selection procedures

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(f) The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except pursuant to the district court plan or as may be necessary in the preparation or presentation of a motion under subsection (a), (b), or (c) of this section, until after the master jury wheel has been emptied and refilled pursuant to section 1863(b) (4) of this title and all persons selected to serve as jurors before the master wheel was emptied have completed such service. The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion. Any person who discloses the contents of any record or paper in violation of this subsection may be fined not more than $1,000 or imprisoned not more than one year, or both.

[29 U.S.C. 181(a) (collective bargaining information)]

§ 181. Compilation of collective bargaining agreements, etc.; use of data

(a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confdence shall be disclosed.

[30 U.S.C. 666 (coal research)]

§ 666. Public-availability requirements; national defense; patent agreements

No research shall be carried out, contracted for, sponsored, cosponsored, or authorized under authority of this chapter, unless all information, uses, products, processes, patents, and other developments resulting from such research will (with such exceptions and

limitations, if any, as the Secretary may find to be necessary in the interest of national defense) be available to the general public. Whenever in the estimation of the Secretary the purposes of this chapter would be furthered through the use of patented processes or equipment, the Secretary is authorized to enter into such agreements as he deems necessary for the acquisition or use of such patents on reasonable terms and conditions.

[30 U.S.C. 951(c) (coal mine safety research)]

§ 951. Studies and research—Appropriate projects

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Contracting with and grants to public and private agencies; availability of information; exceptions

(c) In carrying out the provisions for research, demonstrations, experiments, studies, training, and education under this section and sections 861(b) and 952(a) of this title, the Secretary and the Secretary of Health, Education, and Welfare may enter into contracts with, and make grants to, public and private agencies and organizations and individuals. No research, demonstrations, or experiments shall be carried out, contracted for, sponsored, cosponsored, or authorized under authority of this chapter, unless all information, uses, products, processes, patents, and other developments resulting from such research, demonstrations, or experiments will (with such exception and limitation, if any, as the Secretary or the Secretary of Health, Education, and Welfare may find to be necessary in the public interest) be available to the general public

35 U.S.C.

[35 U.S.C. 122 (patent applications)]

§ 122. Confidential status of applications

Applications for patents shall be kept in confidence by the Patent Office and no information concerning the same given without authority of the applicant or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commissioner.

[35 U.S.C. 181 (patent information)]

§ 181. Secrecy of certain inventions and withholding of patent

Whenever publication or disclosure by the grant of a patent on an invention in which the Government has a property interest might, in the opinion of the head of the interested Government agency, be detrimental to the national security, the Commissioner upon being so notified shall order that the invention be kept secret and shall withhold the grant of a patent therefor under the conditions set forth hereinafter.

Whenever the publication or disclosure of an invention by the granting of a patent, in which the Government does not have a property interest, might, in the opinion of the Commissioner, be detrimental to the national security, he shall make the application for patent in which such invention is disclosed available for inspection

to the Atomic Energy Commission, the Secretary of Defense, and the chief officer of any other department or agency of the Government designated by the President as a defense agency of the United States.

Each individual to whom the application is disclosed shall sign a dated acknowledgement thereof, which acknowledgment shall be entered in the file of the application. If, in the opinion of the Atomic Energy Commission, the Secretary of a Defense Department, or the chief officer of another department or agency so designated, the publication or disclosure of the invention by the granting of a patent therefor would be detrimental to the national security, the Atomic Energy Commission, the Secretary of a Defense Department, or such other chief officer shall notify the Commissioner and the Commissioner shall order that the invention be kept secret and shall withhold the grant of a patent for such period as the national interest requires, and notify the applicant thereof. Upon proper showing by the head of the department or agency who caused the secrecy order to be issued that the examination of the application might jeopardize the national interest, the Commissioner shall thereupon maintain the application in a sealed condition and notify the applicant thereof. The owner of an application which has been placed under a secrecy order shall have a right to appeal from the order to the Secretary of Commerce under rules prescribed by him.

An invention shall not be ordered kept secret and the grant of a patent withheld for a period of more than one year. The Commissioner shall renew the order at the end therof, or at the end of any renewal period, for additional periods of one year upon notification by the head of the department or the chief officer of the agency who caused the order to be issued that an affirmative determination has been made that the national interest continue so to require. An order in effect, or issued, during a time when the United States is at war, shall remain in effect for the duration of hostilities and one year following cessation of hostilities. An order in effect, or issued, during a national emergency declared by the President shall remain in effect for the duration of the national emergency and six months thereafter. The Commissioner may rescind any order upon notification by the heads of the departments and the chief officers of the agencies who caused the order to be issued that the publication or disclosue of the invention is no longer deemed detrimental to the national security.

[35 U.S.C. 186 (patent information)]

§ 186. Penalty

Whoever, during the period or periods of time an invention has been ordered to be kept secret and the grant of a patent thereon withheld pursuant to section 181 of this title, shall, with knowledge of such order and without due authorization, willfully publish or disclose or authorize or cause to be published or disclosed the invention, or material information with respect thereto, or whoever, in violation of the provisions of section 184 of this title, shall file or cause or authorize to be filed in any foreign country an application for patent or for the registration of a utility model, industrial design, or model in respect of any invention made in the United States, shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than two years, or both.

[38 U.S.C. 653(b) (VA patient records)]

§ 653. Voluntary participation; confidentiality

(a) The participation by any person in any program or portion thereof under this subchapter shall be wholly voluntary and shall not be a prerequisite to eligibility for or receipt of any other service or assistance from, or to participation in, any other program under this title.

(b) The Administrator shall promulgate rules and regulations to insure that all information and patient records prepared or obtained under this subchapter shall be held confidential except for (1) such information as the patient (or his guardian) requests in writing to be released or (2) statistical data compiled without reference to patient names or other identifying characteristics.

[38 U.S.C. 3301 (VA records)]

§ 3301. Confidential nature of claims

All files, records, reports, and other papers and documents pertaining to any claim under any of the laws administered by the Veterans' Administration and the names and addresses of present or former personnel of the armed services, and their dependents, in the possession of the Veterans' Administration shall be confidential and privileged, and no disclosure thereof shall be made except as follows:

(1) To a claimant or his duly authorized agent or representative as to matters concerning himself alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section 4009 of this title.

(2) When required by process of a United States court to be produced in any suit or proceeding therein pending.

(3) When required by any department or other agency of the United States Government.

(4) In all proceedings in the nature of an inquest into the mental competency of a claimant.

(5) In any suit or other judicial proceeding when in the judgment of the Administrator such disclosure is deemed necessary and proper.

(6) The amount of pension, compensation, or dependency and indemnity compensation of any beneficiary shall be made known to any person who applies for such information, and the Administrator, with the approval of the President, upon determination that the public interest warrants or requires, may, at any time and in any manner, publish any or all information of record pertaining to any claim.

(7) The Administrator in his discretion may authorize an inspection of Veterans' Administration records by duly authorized representatives of recognized organizations.

(8) The Administrator may release information, statistics, or reports to individuals or organizations when in his judgment such release would serve a useful purpose.

(9) The Administrator may, pursuant to regulations he shall prescribe, release the names and addresses of present or former personnel of the armed services, and/or dependents to any nonprofit organization but only if the release is directly connected with the conduct of programs and the utilization of benefits under this title. Any such organization or member thereof which uses such names and addresses for purposes other than those specified in this clause shall be fined not more than $500 in the case of a first offense, and not more than $5,000 in the case of subsequent offenses.

39 U.S.C.

[39 U.S.C. 410 (postal information)]

§ 410. Application of other laws

(a) Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service.

(b) The following provisions shall apply to the Postal Service:

(1) section 552 (public information), section 3110 (restrictions on employment of relatives), section 3333 and chapter 71 (employee policies) and 73 (suitability, security, and conduct of employees), and section 5520 (withholding city income or employment taxes), and section 5532 (dual pay) of title 5, except that no regulation issued under such chapters or sections shall apply to the Postal Service unless expressly made applicable;

(2) All provisions of title 18 dealing with the Postal Service, the mails, and officers or employees of the Government of the United States;

(3) section 107 of title 20 (known as the Randolph-Sheppard Act, relating to vending machines operated by the blind);

(4) the following provisions of title 40:

(A) sections 258a–258e (relating to condemnation proceedings);

(B) sections 270a–270e (known as the Miller Act, relating to performance bonds);

(C) sections 276a–276a–7 (known as the Davis-Bacon Act, relating to prevailing wages);

(D) section 276c (relating to wage payments of certain contractors);

(E) chapter 5 (the Contract Work Hours Standards Act); and

(F) chapter 15 (the Government Losses in Shipment Act);

(5) the following provisions of title 41:

(A) sections 35–45 (known as the Walsh-Healey Act, relating to wages and hours); and

(B) chapter 6 (the Service Contract Act of 1965); and

(6) sections 2000d, 2000d–1–2000–4 of title 42 (title VI, the Civil Rights Act of 1964).

(c) Subsection (b)(1) of this section shall not require the disclosure of—

(1) the name or address, past or present, of any postal patron;

(2) information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed;

(3) information prepared for use in connection with the negotiation of collective-bargaining agreements under chapter 12 of this title or minutes of, or notes kept during, negotiating sessions conducted under such chapter;

(4) information prepared for use in connection with proceedings under chapter 36 of this title;

(5) the reports and memoranda of consultants or independent contractors except to the extent that they would be required to be disclosed if prepared within the Postal Service; and

(6) investigatory files, whether or not considered closed, compiled for law enforcement purposes except to the extent available by law to a party other than the Postal Service.

42 U.S.C.

[42 U.S.C. 247c(5) (venereal disease records)]

§ 247c. Venereal disease prevention and control projects and programs—Technical assistance

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Terms and conditions; payments, recordkeeping; audit; grant reduction; information disclosure

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(5) All information obtained in connection with the examination, care, or treatment of any individual under any program which is being carried out with a grant made under this section shall not, without such individual's consent, be disclosed except as may be necessary to provide service to him. Information derived from any such program may be disclosed—

(A) in summary, statistical, or other form, or

(B) for clinical or research purposes,

but only if the identity of the individuals diagnosed or provided care or treatment under such program is not disclosed.

[42 U.S.C. 260(d) (drug treatment records)]

§ 260. Addicts and persons with drug abuse or drug dependence problems; admission to hospitals as voluntary patients; examination; payment of charges; length of confinement; forfeiture of civil rights

* * * * * * *

(d) Any addict or other person with a drug abuse or other drug dependence problem admitted for treatment under this section shall not thereby forfeit or abridge any of his rights as a citizen of the United States; nor shall such admission or treatment be used against him in any proceeding in any court; and the record of his voluntary

commitment shall, except as otherwise provided by this chapter, be confidential and shall not be divulged.

[42 U.S.C. 653 (Parent Locater Service records)]

§ 653

"PARENT LOCATOR SERVICE

"SEC. 453. (a) The Secretary shall establish and conduct a Parent Locator Service, under the direction of the designee of the Secretary referred to in section 452(a), which shall be used to obtain and transmit to any authorized person (as defined in subsection (c)) information as to the whereabouts of any absent parent when such information is to be used to locate such parent for the purpose of enforcing support obligations against such parent.

"(b) Upon request, filed in accordance with subsection (d) of any authorized person (as defined in subsection (c)) for the most recent address and place of employment of any absent parent, the Secretary shall, notwithstanding any other provision of law, provide through the Parent Locator Service such information to such person, if such information—

"(1) is contained in any files or records maintained by the Secretary or by the Department of Health, Education, and Welfare; or

"(2) is not contained in such files or records, but can be obtained by the Secretary, under the authority conferred by subsection (e), from any other department, agency, or instrumentality, or the United States or of any State.

No information shall be disclosed to any person if the disclosure of such information would contravene the national policy or security interests of the United States or the confidentiality of census data. The Secretary shall give priority to requests made by any authorized person described in subsection (c)(1).

[42 U.S.C. 1306 (social security records)]

§ 1306. Disclosure of information in possession of Department of Health, Education, and Welfare or Department of Labor; compliance with requests for information and services

(a) No disclosure of any return or portion of a return (including information returns and other written statements) filed with the Commissioner of Internal Revenue under Title VIII of the Social Security Act or under subchapter E of chapter 1 or subchapter A of chapter 9 of Title 26, or under regulations made under authority thereof, which have been transmitted to the Secretary of Health, Education, and Welfare or to the Secretary of Labor, as the case may be, by the Commissioner of Internal Revenue, or of any file, record, report or other paper, or any information, obtained at any time by the Secretary of Health, Education, and Welfare, or the Secretary of Labor, or by any officer or employee of the Department of Health, Education, and Welfare or the Department of Labor in the course of discharging their respective duties under this chapter, and no disclosure of any such file, record, report, or other paper, or information, obtained at any time by any person from the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, or from any officer or employee of the Department of Health, Education, and Welfare or the Depart-

ment of Labor shall be made except as the Secretary of Health, Education, and Welfare or the Secretary of Labor, as the case may be, may be regulations prescribe. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not exceeding $1,000, or by imprisonment not exceeding one year, or both.

* * * * * * *

(d) Notwithstanding any other provision of this section the Secretary shall make available to each State agency operating a program under subchapter XIX of this chapter and shall, subject to the limitations contained in subsection (e) of this section, make available for public inspection in readily accessible form and fashion, the following official reports (not including, however, references to any internal tolerance rules and practices that may be contained therein, internal working papers or other informal memoranda) dealing with the operation of the health programs established by subchapters XVIII and XIX of this chapter—

(1) individual contractor performance reviews and other formal evaluations of the performance of carriers, intermediaries, and State agencies, including the reports of follow-up reviews;

(2) comparative evaluations of the performance of such contractors, including comparisons of either overall performance or of any particular aspect of contractor operation; and

(3) program validation survey reports and other formal evaluations of the performance of providers of services, including the reports of follow-up reviews, except that such reports shall not identify individual patients, individual health care practitioners, or other individuals.

(e) No report described in subsection (d) of this section shall be made public by the Secretary or the State subchapter XIX agency until the contractor or provider of services whose performance is being evaluated has had a reasonable opportunity (not exceeding 60 days) to review such report and to offer comments pertinent parts of which may be incorporated in the public report; nor shall the Secretary be required to include in any such report information with respect to any deficiency (or improper practice or procedures) which is known by the Secretary to have been fully corrected, within 60 days of the date such deficiency was first brought to the attention of such contractor or provider of services, as the case may be.

[42 U.S.C. 1320c-15 (patient records)]

§ 1320c-15. Disclosure of information prohibited

(a) Any data or information acquired by any Professional Standards Review Organization, in the exercise of its duties and functions, shall be held in confidence and shall not be disclosed to any person except (1) to the extent that may be necessary to carry out the purposes of this part or (2) in such cases and under such circumstances as the Secretary shall by regulations provide to assure adequate protection of the rights and interests of patients, health care practitioners, or providers of health care.

(b) It shall be unlawful for any person to disclose any such information other than for such purposes, and any person violating the

provisions of this section shall, upon conviction, be fined not more than $1,000, and imprisoned for not more than six months, or both, together with the costs of prosecution.

[42 U.S.C. 1395bb(a)(2) (accreditation reports)]

§ 1395bb. Effect of accreditation

(a) Except as provided in subsection (b) of this section and the second sentence of section 1395z of this title, if—

(1) an institution is accredited as a hospital by the Joint Commission on Accreditation of Hospitals, and

(2) such institution (if it is included within a survey described in section 1395aa(c) of this title) authorizes the Commission to release to the Secretary (on a confidential basis) upon his request (or such State agency as the Secretary may designate) a copy of the most current accreditation survey of such institution made by such Commission,

then, such institution shall be deemed to meet the requirements of the numbered paragraphs of section 1395x(e) of this title;

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[42 U.S.C. 2000e-5(b) (EEOC information)]

§ 2000e-5. Enforcement provisions—Power of Commission to prevent unlawful employment practices

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Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigations by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, unemployment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local laws pursuant to the requirements of

subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

[42 U.S.C. 2000e–8(e) (EEOC information)]

§ 2000e–8. Investigations—Examination and copying of evidence related to unlawful employment practices

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Prohibited disclosures; penalties

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

[42 U.S.C. 2000g–2(b) (labor mediation records)]

§ 2000g–2. Cooperation with other agencies; conciliation assistance in confidence and without publicity; information as confidential; restriction on performance of investigative or prosecuting functions; violations and penalties

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(b) The activities of all officers and employees of the Service in providing conciliation assistance shall be conducted in confidence and without publicity, and the Service shall hold confidential any information acquired in the regular performance of its duties upon the understanding that it would be so held. No officer or employee of the Service shall engage in the performance of investigative or prosecuting functions of any department or agency in any litigation arising out of a dispute in which he acted on behalf of the Service. Any officer or other employee of the Service, who shall make public in any manner whatever any information in violation of this subsection, shall be deemed

guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than one year.

[42 U.S.C. 2162 (atomic energy information)]

§ 2162. Classification and declassification of Restricted Data—Periodic determination

(a) The Commission shall from time to time determine the data, within the definition of Restricted Data, which can be published without undue risk to the common defense and security and shall thereupon cause such data to be declassified and removed from the category of Restricted Data.

Continuous review

(b) The Commission shall maintain a continuous review of Restricted data and of any Classification Guides issued for the guidance of those in the atomic energy program with respect to the areas of Restricted Data which have been declassified in order to determine which information may be declassified and removed from the category of Restricted Data without undue risk to the common defense and security.

Joint determination on atomic weapons; Presidential determination on disagreement

(c) In the case of Restricted Data which the Commission and the Department of Defense jointly determine to relate primarily to the military utilization of atomic weapons, the determination that such data may be published without constituting an unreasonable risk to the common defense and security shall be made by the Commission and the Department of Defense jointly, and if the Commission and the Department of Defense do not agree, the determination shall be made by the President.

Same; removal from Restricted Data category

(d) The Commission shall remove from the Restricted Data category such data as the Commission and the Department of Defense jointly determine relates primarily to the military utilization of atomic weapons and which the Commission and Department of Defense jointly determine can be adequately safeguarded as defense information *Provided, however*, That no such data so removed from the Restricted Data category shall be transmitted or otherwise made available to any nation or regional defense organization, while such data remains defense information, except pursuant to an agreement for cooperation entered into in accordance with section 2164(b) of this title.

Joint determination on atomic energy programs

(e) The Commission shall remove from the Restricted Data category such information concerning the atomic energy programs of other nations as the Commission and the Director of Central Intelligence jointly determine to be necessary to carry out the provisions

of section 403(d) of Title 50 and can be adequately safeguarded as defense information.

[42 U.S.C. 2181(e) (atomic energy information)]

§ 2181. Inventions relating to atomic weapons, and filing of reports—Denial of patent; revocation of prior patents

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Confidential information; circumstances permitting disclosure

(e) Reports filed pursuant to subsection (c) of this section, and applications to which access is provided under subsection (d) of this section, shall be kept in confidence by the Commission, and no information concerning the same given without authority of the inventor or owner unless necessary to carry out the provisions of any Act of Congress or in such special circumstances as may be determined by the Commission.

[42 U.S.C. 2231 (atomic energy information)]

§ 2231. Applicability of Administrative Procedure Act; definitions

The provisions of the Administrative Procedure Act shall apply to all agency action taken under this chapter, and the terms "agency" and "agency action" shall have the meaning specified in the Administrative Procedure Act: *Provided, however*, That in the case of agency proceedings or actions which involve Restricted Data or defense information, the Commission shall provide by regulation for such parallel procedures as will effectively safeguard and prevent disclosure of Restricted Data or defense information to unauthorized persons with minimum impairment of the procedural rights which would be available if Restricted Data or defense information were not involved.

[42 U.S.C. 3610(a) (housing discrimination)]

§ 3610. Enforcement—Person aggrieved; complaint; copy; investigation; informal proceedings; violations of secrecy; penalties

(a) Any person who claims to have injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. Complaints shall be in writing and shall contain such information and be in such form as the Secretary requires. Upon receipt of such a complaint the Secretary shall furnish a copy of the same to the person or persons who allegedly committed or are about to commit the alleged discriminatory housing practice. Within thirty days after receiving a complaint, or within thirty days after the expiration of any period of reference under subsection (c) of this section, the Secretary shall investigate the complaint and give notice in writing to the person aggrieved whether he intends to resolve it. If the Secretary decides to resolve the complaint, he shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. Nothing said or done in the course of such informal endeavors may be made public or used as evidence in a subsequent proceeding under this sub-

chapter without the written consent of the persons concerned. Any employee of the Secretary who shall make public any information in violation of this provision shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

[42 U.S.C. 5658 (juvenile records)]

§ 5658. Records; restrictions on disclosure and transfer

Records containing the identity of individual juveniles gathered for purposes pursuant to this subchapter may under no circumstances be disclosed or transferred to any individual or other agency, public, or private.

[42 U.S.C. 5732 (juvenile records)]

§ 5732. Records; restrictions on disclosure and transfer

Records containing the identity of individual runaway youths gathered for statistical purposes pursuant to section 5731 of this title may under no circumstances be disclosed or transferred to any individual or to any public or private agency.

45 U.S.C.

[45 U.S.C. 362(d) (Railroad Retirement Board information)]

§ 362. Duties and powers of Board—Witnesses; subpenas, service, fees, etc.

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Information as confidential

(d) Information obtained by the Board in connection with the administration of this chapter shall not be revealed or open to inspection or be published in any manner revealing an employee's identity: *Provided, however*, That (i) the Board may arrange for the exchange of any information with governmental agencies engaged in functions related to the administration of this chapter; (ii) the Board may disclose such information in cases in which the Board finds that such disclosure is clearly in furtherance of the interest of the employee or his estate; and (iii) any claimant of benefits under this chapter shall, upon his request, be supplied with information from the Board's records pertaining to his claim. Subject to the provisions of this section, the Board may furnish such information to any person or organization upon payment by such person or organization to the Board of the cost incurred by the Board by reason thereof; and the amounts so paid to the Board shall be credited to the railroad unemployment insurance administration fund established pursuant to section 361 (a) of this title.

46 U.S.C.

[46 U.S.C. 234 (Coast Guard information)]

§ 234. Officers to assist in examinations; dismissal of official disclosing source of information

All officers licensed under the provisions of sections 214, 224, 226, 228, 229, and 230 of this title shall assist the Coast Guard in its examination of any vessels to which such licensed officers belong and

shall point out all defects and imperfections known to them in the hull, equipments, boilers, or machinery of such vessel, and shall also make known to the Coast Guard at the earliest opportunity all accidents or occurrences producing serious injury to the vessel, her equipments, boilers, or machinery, and in default thereof the license of any such officer so neglecting or refusing shall be suspended or revoked.

No Coast Guard official receiving information from a licensed officer who is employed on any vessel as to defects in such vessel, or her equipments, boilers, or machinery, or that any provision of title 52 of the Revised Statutes is being violated, shall impart the name of such licensed officer, or the source of his information to any person other than his superiors in the Coast Guard. Any Coast Guard official violating this provision shall be subject to dismissal from the service.

[46 U.S.C. 643(f) (Coast Guard discharge books)]

§ 643. Continuous discharge book and certificate of identification—Issuance; form and contents

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Records of discharge books and certificates

(f) There shall be maintained in the Coast Guard in Washington, District of Columbia, a record of every continuous discharge book, certificate of identification, certificate of discharge, and any other certificate issued by the Coast Guard, together with the name and address of the seaman to whom it is issued and of his next of kin, and certified copies of all entries made in continuous discharge books or certificates of discharge, which entries shall be forwarded to the Coast Guard by the Coast Guard official to whom the duties of shipping commissioner have been delegated or other person making such entries in accordance with the provisions of this section. Records so maintained shall not be open for general or public use or inspection.

[46 U.S.C. 1464(d) (boat safety)]

§ 1464. Repair or replacement of defects

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Copy of notification for Secretary; public disclosure by Secretary

(d) Every manufacturer shall furnish to the Secretary a true or representative copy of all notices, bulletins, and other communications to dealers or distributors of such manufacturer or to purchasers, or subsequent purchasers, of boats or associated equipment of such manufacturer, regarding any defect relating to safety in such boats or associated equipment or any failure to comply with a standard, regulation, or order applicable to such boat or associated equipment. The Secretary may publish or otherwise disclose to the public so much of the information contained in such notices or other information in his possession as he deems will assist in carrying out the purposes of this chapter, but shall not disclose any information which contain or relates to a trade secret unless he determines that it is necessary to carry out the purposes of this chapter.

47 U.S.C.

[47 U.S.C. 154(j) (FCC information)]

§ 154. Federal Communications Commission—Number of commissioners; appointment; chairman

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Conduct of proceedings; hearings

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

[47 U.S.C. 220(f) (FCC information)]

§ 220. Accounts, records, and memoranda; depreciation charges; forfeitures and penalties

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(f) No member, officer, or employee of the Commission shall divulge any fact or information which may come to his knowledge during the course of examination of books or other accounts, as hereinbefore provided, except insofar as he may be directed by the Commission or by a court.

[47 U.S.C. 412 (FCC information)]

§ 412. Documents filed with Commission as public records; prima facie evidence; confidential records

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Provided, That the Commission may, if the public interest will be served thereby, keep confidential any contract, agreement, or arrangement relating to foreign wire or radio communication when the publication of such contract, agreement, or arrangement would place American communication companies at a disadvantage in meeting the competition of foreign communication companies.

49 U.S.C.

[49 U.S.C. 20 par. 7(f) (ICC information)]

§ 20, par. (7). Penalties and forfeitures in connection with accounts, records, reports, etc.

* * * * * * *

(f) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this section, except insofar as he may be directed

by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $500 or imprisonment for not exceeding six months, or both.

[49 U.S.C. 320(a) (ICC records)]

§ 320. Accounts, records and reports—Reports to Commission; copies of contracts; publication of information

(a) The Commission is authorized to require annual, periodical, or special reports from all motor carriers, brokers, lessors, and associations (as defined in this section); to prescribe the manner and form in which such reports shall be made; and to require from such carriers, brokers, lessors, and associations specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary. Such annual reports shall give an account of the affairs of the carrier, broker, lessor, or association in such form and detail as may be prescribed by the Commission. The Commission may also require any motor carrier or broker to file with it a true copy of any contract, agreement, or arrangement between such carrier and any other carrier or person in relation to any traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, agreement, or arrangement between a contract carrier by motor vehicle and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by motor vehicle as required by section 318(a) of this title, the Commission may, in its discretion, make public such of the provisions of the contract as the Commission considers necessary to disclose such failure and the extent thereof.

[49 U.S.C. 322(d) (ICC records)]

§ 322. Unlawful operation—Violation of chapter or rules or orders; penalty where none otherwise provided

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Disclosure of information by agent, accountant, or examiner; penalty

(d) Any special agent, accountant, or examiner who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of section 320 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States or competent jurisdiction, to a fine of not more than $500 or imprisonment for not exceeding six months, or both.

[49 U.S.C. 913(b) (ICC records)]

§ 913. Accounts, records, and reports

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(b) The Commission may also require any such carrier to file with it a true copy of any contract, charter, or agreement between such

carrier and any other carrier or person in relation to transportation facilities, service, or traffic affected by the provisions of this chapter. The Commission shall not, however, make public any contract, charter, or agreement between a contract carrier by water and a shipper, or any of the terms or conditions thereof, except as a part of the record in a formal proceeding where it considers such action consistent with the public interest: *Provided*, That if it appears from an examination of any such contract that it fails to conform to the published schedule of the contract carrier by water as required by section 906.

[49 U.S.C. 917(e) (ICC records)]

§ 917. Unlawful acts and penalties

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(e) Any special agent, accountant, or examiner of the Commission who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of section 913 of this title, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than $500 or imprisonment for a term not exceeding six months, or both.

[49 U.S.C. 1021(e) (ICC records)]

§ 1021. Unlawful acts and penalties

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(e) Any special agent, accountant, or examiner of the Commission who knowingly and willfully divulges any fact or information which may come to his knowledge during the course of any examination or inspection made under authority of this chapter, except as he may be directed by the Commission or by a court or judge thereof, shall be guilty of a misdemeanor, and upon conviction thereof shall be subject to a fine of not more than $500 or imprisonment for not exceeding six months, or both.

50 U.S.C. APP

[50 U.S.C. App. 327 (relective service records)]

§ 327. Rules and regulations; penalties

The Director is authorized to prescribe such rules and regulations as may be necessary to preserve the confidential nature of the individual confidential records previously obtained under the Selective Training and Service Act of 1940, as amended. Any person charged with the duty of carrying out any of the provisions of this Act [sections 321–329 of this Appendix], and who fails to carry out such provisions or who shall knowingly violate the regulations promulgated under this section, or any person or persons who shall unlawfully obtain, gain access to, or use records, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years, or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law, may be tried by court martial,

and, on conviction, shall suffer such punishment as the court martial may direct.

[50 U.S.C. App. 643a (defense production records)]

§ 643a. Oaths and affirmations; attendance and testimony of witnesses; production of records and other evidence; unlawful disclosure of information obtained

For the purpose of obtaining any information or making any inspection or audit pursuant to section 1301 [section 643 of this Appendix], any agency acting hereunder or the Chairman of the War Production Board, as the case may be, may administer oaths and affirmations and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be deemed relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpena issued with respect thereto, such person furnishes such agency or the Chairman of the War Production Board, as the case may be, with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with such agency or the Chairman of the War Production Board, as the case may be, as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Such agency or the Chairman of the War Production Board shall not publish or disclose any information obtained under this title [sections 643–643c of this Appendix] which such agency or the Chairman of the War Production Board deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless such agency or the Chairman of the War Production Board determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony and upon conviction thereof shall be fined not exceeding $1,000, or be imprisoned not exceeding two years, or both.

[50 U.S.C. App. 1152(a)(4) (defense contracts)]

§ 1152. Contracts for acqisition, construction and repair of naval vessels, aircraft, and equipment therefor—(a) (1) Negotiation authorized; priority of deliveries; open market purchases; bond; limitation of contractor's fee

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(4) Attendance of witnesses; production of evidence; fees; disclosure of information

For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3)

[of this subsection], the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided*, That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. The President shall not publish or disclose any information obtained under this paragraph which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information, unless the President determines that the withholding thereof is contrary to the interest of the national defense and security; and anyone violating this provision shall be guilty of a felony and upon conviction thereof shall be fined not exceeding $1,000, or be imprisoned not exceeding two years, or both.

[50 U.S.C. App. 2155(e) (defense production controls)]

§ 2155. Investigations; records; reports; subpenas; right to counsel

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(e) Information obtained under this section which the President deems confidential or with reference to which a request for confidential treatment is made by the person furnishing such information shall not be published or disclosed unless the President determines that the withholding thereof is contrary to the interest of the national defense, and any person willfully violating this provision shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both.]

[50 U.S.C. App. 2160(f) (commodity speculation)]

§ 2160. Employment of person; appointment policies; nucleus executive reserve; use of confidential information by employees; printing and distirbution of reports

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(f) Whoever, being an officer or employee of the United States or any department or agency thereof (including any Member of the Senate or House of Representatives), receives, by virtue of his office or employment, confidential information, and (1) uses such information in speculating directly or indirectly on any commodity exchange, or (2) discloses such information for the purpose of aiding any other person so to speculate, shall be fined not more than $10,000 or impris-

oned not more than one year, or both. As used in this section, the term "speculate" shall not include a legitimate hedging transaction, or a purchase or sale which is accompanied by actual delivery of the commodity.

50 U.S.C. App. 2403 (c)

[50 U.S.C. App. 2403(c) (export information)]

MONITORING AND CONSULTATION

SEC. 3. (a) Section 4 of the Export Administration Act of 1969 is amended by redesignating subsections (c) through (e) thereof as subsections (d) through (f), respectively, and by inserting after subsection (b) a new subsection (c) as follows:

"(c)(1) To effectuate the policy set forth in section 3(2)(A) of this Act, the Secretary of Commerce shall monitor exports, and contracts for exports, of any article, material, or supply (other than a commodity which is subject to the reporting requirements of section 12 of the Agricultural Act of 1970) when the volume of such exports in relation to domestic supply contributes, or may contribute, to an increase in domestic prices or a domestic shortage, and such price increase or shortage has, or may have, a serious adverse impact on the economy or any sector thereof. Information which the Secretary requires to be furnished in effecting such monitoring shall be confidential, except as provided in paragraph (2) of this subsection.

"(2) The results of such monitoring shall, to the extent practicable, be aggregated and included in weekly reports setting forth, with respect to each article, material, or supply monitored, actual and anticipated exports, the destination by country, and the domestic and worldwide price, supply, and demand. Such reports may be made monthly if the Secretary determines that there is insufficient information to justify weekly reports."

Public Law 93-199

[Public Law 93-199, sec. 5 (foreign assistance studies)]

SEC. 5. The Secretary of Defense shall conduct a study of the 1973 Arab-Israeli conflict to ascertain the effectiveness of the foreign military assistance program as it relates to the Middle East conflict, including weapons that the United States is providing to Israel through foreign assistance programs, and to compare them to the effectiveness of the weapons which the Soviet Union is providing to the Arab States. In conducting such study and submitting such report, the Secretary shall take care not to disclose, directly or indirectly, intelligence sources or methods or confidential information received from any other nation. A report of the conclusions of such study shall be submitted to the Congress as soon as practical and in any case not later than December 31, 1974.

MORTON ROSENBERG,
Legislative Attorney.

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